Supreme Court, U.S.
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No. 02 148

In The

Supreme Court of the United States

NARESH ARORA,

Petitioner,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS;
CITY OF LOS ANGELES,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Third Division

PETITION FOR A WRIT OF CERTIORARI

NARESH C. ARORA
Chase Street, # 139
Canoga Park, CA 91304-2636
(818) 341-7487
Pro se

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QUESTIONS PRESENTED

1. Whether the state appellate court can invoke "hypothetical jurisdiction" to render a valid and lawful judgment when the record discloses that an administrative agency lacks jurisdiction due to noncompliance of mandatory statutory code provisions involving the Due Process Clause of the Fifth and Fourteenth Amendments.

2. Whether the Due Process Clause of the Fifth and Fourteenth Amendments allows a public employer to terminate a permanent civil service employee without any opportunity to be heard "before termination." Further, whether the Due Process Clause of the Fourteenth Amendment allows the state appellate court to render a decision, after a timely petition for rehearing is filed, by affirming the decision of an administrative agency *and* denying the petition for rehearing.

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PETITION FOR A WRIT OF CERTIORARI

This is a Petition for a Writ of Certiorari to the Court of Appeal's decision affirming the Superior Court's judgment denying petitioner's petition for a writ of mandate seeking to set aside respondents' decision to terminate petitioner's employment.

OPINIONS BELOW

The opinion of the Court of Appeal is unreported and is reprinted in the Appendix. (App. 1-12). The report of the Hearing Examiner (hereinafter "Administrative Law Judge" or "ALJ"), Board of Civil Service Commissioners, City of Los Angeles, California, is unreported and is reprinted in the Appendix. (App. 15-28). The findings of fact and conclusions of law (commonly known as a "Statement of Decision" in the State of California), as part of the judgment of the California Superior Court, is unreported and is reprinted in the Appendix. (App. 31-33). The modified opinion of the Court of Appeal is unreported and is reprinted in the Appendix. (App. 35-38).

JURISDICTION

The Judgment of the Court of Appeal of California, Second Appellate District, Third Division, was entered on February 7, 2002. The Court of Appeal denied a timely petition for rehearing on February 28, 2002. On May 1, 2002, the Supreme Court of California denied a discretionary petition for review. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the Constitution of the United States provides in pertinent part that: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

2. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

3. Section 7 of Article 1 of the California Constitution provides in pertinent part that: "A person may not be deprived of life, liberty, or property without due process of law. . . . "

4. Section 15 of Article 1 of the California Constitution provides in pertinent part that: "Persons may not be deprived of life, liberty, or property without due process of law."

5. Article VI, Section 14 of the California Constitution provides in pertinent part: "Decisions of the . . . courts of appeal that determine causes shall be in writing with reasons stated."

6. § 251 of Manual of Policies and Procedures, Department of Transportation, City of Los Angeles, California.

7. Personnel Department Policy 33.1E.

8. Personnel Department Policy 33.1F3.

9. § 112(a) of the Charter of City of Los Angeles.

10. Los Angeles Administrative Code, Section 19.36.

11. California Codes of Civil Procedure, Sections 632, 1013(a), 1094.5(a), 1094.5(b).

12. California Evidence Code, Sections 452(c), 452(h).

STATEMENT OF THE CASE

The Facts

Petitioner, Naresh C. Arora (Arora), was permanently and regularly employed as a Transportation Engineering Associate, by the Department of Transportation, City of Los Angeles (the City). At the time of his termination on June 23, 1998, petitioner was continuously employed by the City since 1988. Petitioner's employment led him to sue the City on April 22, 1998, on several theories including the denial of family and medical leave. Soon after the suit was initiated, petitioner was transferred to a different section, where his supervisor was Brian Gallagher ("Gallagher"). Petitioner reported to Gallagher on May 14, 1998, following an illness.

On May 21, 1998 at about 9:00 a.m., petitioner's new supervisor, Gallagher, ordered Arora not to bring ethnic lunch at work, not to keep his Hindu Holy Bible (Mahabharata), not to keep medication at work, and ordered him not to keep any of his personal belongings, inter alia, sweater, check book, pair of prescription glasses, money for emergency use, umbrella, etc. At the same time, after learning about the ongoing lawsuit, Gallagher gave an oral warning for unfounded reasons and threatened petitioner with another harsh warning the following day. On May 21, 1998, petitioner left work early, due to illness. The

following day petitioner left a voice mail message for Gallagher stating that he was still ill.

Starting May 26, 1998, which is the day after the Memorial Day weekend, petitioner's former counsel, Raj D. Roy (Roy), made several unsuccessful attempts with the City to have petitioner's grievances resolved and petitioner's suspended constitutional and civil rights be reinstated. Roy also advised petitioner not to go to work pending the resolution of the grievances. The City did not conduct meaningful investigation or offer any resolution. Petitioner also informed Gallagher of his absence from work and the reasons thereof, while at the same time attempted to mitigate the situation by bringing it to the attention of the proper authority, the Equal Employment Opportunity Coordinator (EEOC). The EEOC took no action nor informed petitioner about its inaction in a timely manner.

On June 20, 1998, a notice through U.S. mail was received by petitioner regarding a predischarge disciplinary due process hearing scheduled for June 19, 1998 and for a proposed discharge, in part, on the failure to attend the hearing. In California, this type of hearing is termed as a *Skelly*[1] hearing. The letter was dated June 15, 1998.

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[1] In *Skelly v. State Personnel Bd.*, 15 Cal.3d 194 (1975), the California Supreme Court held that due process requires, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. *Id.* at 215. Failure to afford preremoval hearing to permanent civil service employee "before termination" violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution. *Ibid.*

No material was enclosed other than a blank resignation form. Petitioner had not attended the *Skelly* hearing as he had not received the notice in time to attend the *Skelly* hearing. Petitioner's former counsel, Roy, faxed a letter to the City's attorney on June 23, 1998, informing the city attorney of the defective *Skelly* hearing notice. The City failed to respond.

On June 23, 1998, according to Gallagher's hand written certification, Gallagher went to petitioner's residence, knocked on the door for about a minute; and when nobody answered, he pasted a Notice of Discharge ("accusatory pleading" or "Notice of Discharge" or "Form 77") on the door. No facts, no disciplinary charges, and no corresponding penalties were stated on the accusatory pleading, except a title, "Absent without valid leave," in the column for a "Cause of action."

The Proceedings Below

On June 24, 1998, petitioner filed an Administrative Appeal from Discharge to the Administrative Adjudicating Agency, the Board of Civil Service Commissioners (the Board), City of Los Angeles (the City), California. The case was assigned to Jill Klein, the Administrative Law Judge. (App. 16). A trial-like hearing was held on October 1, 1998. *Ibid.* The Board conceded that no subpoena and subpoena duces tecum were issued to any witnesses who appeared on October 1, 1998. ALJ failed to examine and determine following two jurisdictional elements involving due process questions to establish its own jurisdiction:

(1) Personnel Department Policy 33.1E (App. 40): Whether *Skelly* hearing was afforded to petitioner Arora. (See Part II, *infra*)

(2) Personnel Department Policy 33.1F3 (App. 41): Whether statutory disciplinary charges, corresponding penalties and facts which led to petitioner's discharge for a cause of action of title, "*Absent Without Valid Leave*" were stated on the accusatory pleading. Whether the accusatory pleading was properly served to petitioner and filed with the Board. (See Parts III and IV, *infra*)

Indicating Board's lack of jurisdiction, ALJ only made cursory remarks by saying, "The Appellant [Arora] did not attend the hearing, thus no *Skelly* objections are raised . . . " (App. 17). Based upon the merits of the case, ALJ determined that petitioner was guilty of the first offense of Count (1): Unexcused, excessive or patterned absenteeism; and the first offense of Count (2): Failure to make reasonable effort to notify supervisor of inability to report for work. (App. 26). ALJ recommended to the Board that the cause of action titled, "*Absent Without Valid Leave*" be sustained and the penalty of discharge be sustained. (App. 28).

Petitioner filed two exceptions, one on November 11, 1998 and another on November 12, 1998, citing several incidents of alleged due process violations, which took place throughout the administrative proceedings. (App. 50-51). Without considering the exceptions at the Board's meeting on November 13, 1998, all five members of the Board unanimously decided to adopt ALJ's recommendation, which was based exclusively on the merits. (App. 50-52).

Petitioner then instituted a petition for a writ of mandate (or "extraordinary relief") in a California Superior Court, the court of first instance, for a judicial review of the Board's record consisting of all the proceedings, pleadings, and orders specifically challenging his termination by contending that (1) the Board acted without jurisdiction, (2) the City and the Board violated Arora's

constitutional due process rights, and (3) ALJ's recommendation of sustaining Arora's discharge, and ultimately its adoption by the Board was erroneous. These federal questions which are raised in this petition, were also raised in great detail, citing several California authorities, on pages 2 through 8 in the "Petitioner's Opening Brief." See also App. 5, 32. Sylvia Trowbridge, the custodian of the administrative record in the Board's possession, filed a declaration itemizing all the documents, which were part of the administrative record. Before the merits hearing on February 16, 2000, petitioner made a request for a written "Statement of Decision," which included a request of findings of facts and the legal basis of all the Board's jurisdictional elements. The Superior Court stated that the tentative minute order would be a "Statement of Decision" and the court entered the order, "nunc pro tunc" sometime after February 16, 2000, showing entry on February 16, 2000. The Superior Court did not determine and provide in writing two jurisdictional elements involving due process questions to establish the Board's jurisdiction as part of the "Statement of Decision," over timely objections. (App. 31-33). The tentative minute order is materially the same as the contents of the judgment. *Ibid.* Judgment was entered denying the petition for a writ of mandate.

A timely notice of appeal was filed in the California Court of Appeal. Petitioner filed an opening brief contending, among other things, that (1) petitioner was not afforded a pre-termination *Skelly* hearing before he was terminated from the City job, and (2) that the Superior Court lacked jurisdiction to enter a valid and lawful judgment as the Board failed to determine and establish two due process prerequisites of its own jurisdiction. These federal questions which are raised in this petition, were

also raised in great detail on pages 13 through 30 in the "Appellant's Amended Opening Brief." See also App. 5-10, 35-38. The respondents, the Board and the City, at the time of filing respondents' brief, made a request to the Court of Appeal to take a judicial notice pursuant to California Evidence Code § 452(h) (Same as Rules of Evidence for United States Courts and Magistrates, Rule 201(b) at App. 48) of the following portion of the government record of the Minutes of the Friday July 31, 1998 Regular Meeting of the Board of Civil Service Commissioners, City of Los Angeles, California (App. 48):

> "Naresh C. Arora, Transportation Engineering Associate, Department of Transportation. Discharge effective June 23, 1998. Filed CSC June 24, 1998.
>
> In accordance with Charter Section 112a, Mr. Arora filed his Appeal in the office of the commission on June 24, 1998.
>
> *Hearing Scheduled*: August 21, 1998
>
> (Continued from July 30, 1998)
>
> File No. 49249"

The respondents' counsel rephrased and completely misinterpreted the item of the Minutes of July 31, 1998, Board's Regular Meeting, at page 35 of the respondents' brief, as follows:

> "At its July 31, 1998 regular meeting, (the next regularly scheduled meeting after receipt of Arora's form 77 notice) the Board . . . made the Notice of Discharge and [Administrative] Appeal of the Discharge of Naresh Arora a matter of record. (See Minutes of July 31, 1998 of the Board

. . . , judicially noticed and filed concurrently herewith, at page 23.)"

The court granted respondents' request for a judicial notice without any opinion (App. 34), over petitioner's timely objections. Petitioner filed a reply brief arguing again, inter alia, that the court made a prejudicial error by taking a judicial notice of the government record, as it raises several doubts. Petitioner further argued on page 16 of the reply brief that taking a judicial notice of the Minutes of July 31, 1998, Board's Regular Meeting, is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. Petitioner further argued that the unknown document filed was not necessarily the accusatory pleading, as respondents' counsel portrays. Petitioner also argued on the same page that the appellate process should not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretations are disputable. The Court of Appeal filed an opinion affirming the Superior Court's judgment. (App. 1-12).

While denying the petition for rehearing, the Court of Appeal made factual findings to establish that a *Skelly* hearing notice, which was received by petitioner on June 20, 1998 for a hearing on June 19, 1998, afforded an opportunity to be heard and thus complied with due process of law. (App. 37). Court of Appeal also stated that petitioner had not requested, any time before or after June 23, 1998, for another *Skelly* hearing after petitioner received a late *Skelly* hearing notice. *Ibid.*

Finally, in a petition for a review on pages 11 through 27 filed with the California Supreme Court, petitioner

raised the issue of lack of Court of Appeal's jurisdiction as a result of lack of the Board's jurisdiction implicated essentially due to non-compliance of two due process prerequisites stated *supra* at page 5-6. The California Supreme Court denied the petition and an order of the denial became effective immediately after filing. (App. 39).

REASONS FOR GRANTING THE WRIT

This Court has never faced a situation when the appellate court acting under the doctrine of "hypothetical jurisdiction," makes factual findings and incorrectly determines and establishes the administrative agency's jurisdiction, who in fact neglected to determine and establish its own jurisdiction, and renders the judgment on the merits of the case instead of remanding to the administrative agency declaring the entire proceedings as void.

This Court has declined to endorse the doctrine of "hypothetical jurisdiction," while unanimously setting aside the decision in *United States v. Troescher*, 99 F.3d 933, 934, n. 1 (9th Cir. 1996) on the merits of the case. See *Steel Co., AKA Chicago Steel & Pickling Co. v. Citizens for Better Environment,* 523 U.S. 83, 94-95 (1998).

This Court stated in *Steel Co.* that invoking "hypothetical jurisdiction" carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This Court further held that, " '[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the

cause.' (Citation omitted.) 'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" *Ibid.*

This Court also stated that "[t]he requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'" *Ibid*; quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). The rule springing from the nature and limits of the judicial power of the United States requires this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *Mansfield, C. & L. M. R. Co., supra,* 111 U.S. at 382.

This Court should exercise its appellate power to declare the whole proceedings, starting from the administrative level to the Court of Appeal level, as null and void. There is a special need for this Court's guidance in such cases.

I. Invoking "Hypothetical Jurisdiction" By The Court Of Appeal To Render Decision On The Merits Of The Case Is Repugnant To The Relevant Decision Of This Court

At the administrative level, ALJ was mandated *sua sponte* as first order of business, regardless of whether the

question was raised by any party, to make factual determination of the Board's own jurisdiction and make that determination as first part of the report pursuant to Disciplinary Hearing Rule 12, § 12.4. (App. 43-44). This required examining, determining, and affirmatively establishing the two due process prerequisites to confer jurisdiction, stated *supra* at page 5-6. For first due process prerequisite, see Part II, *infra*. For second due process prerequisite, see Part III and IV, *infra*. ALJ failed to carry out her duty, and instead invoked "hypothetical jurisdiction" to recommend to the Board that the cause of action be sustained and penalty of discharge be sustained.

Disciplinary Hearings Rules, § 12.12 also mandates, in part, that the ALJ's report to the Board shall include findings and recommendations relating to the City's compliance of the two due process prerequisites to establish its own jurisdiction. (App. 43). ALJ's report does not contain these findings. (App. 16-18). The burden was unequivocally on the City to affirmatively show in the record, properly in front of ALJ, that the City complied with the two due process prerequisites to help facilitate the Board to confer its own jurisdiction. See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, at 230-231 (1990). ALJ erroneously put the burden of proof on petitioner, when ALJ stated that petitioner did not raise *Skelly* objections. (App. 17).

Subsequently, the Board of 5 members neglected to review ALJ's report for the purpose of determining and establishing the two jurisdictional elements involving due process questions to establish its own jurisdiction pursuant to Hearing Disciplinary Rule 12, § 12.15. (App. 43, 50-52). Instead, the Board also invoked "hypothetical

jurisdiction" to adopt ALJ's recommendation based purely on the merits.

The California Superior Court, court of first instance, was mandated, while making judicial review of administrative record, to ensure that the Board had complied with the two due process prerequisites to confer jurisdiction. See, e.g., *Steel Co., supra,* 523 U.S. at 93; See also California Code of Civil Procedure, § 1094.5(b) at App. 47. Instead of ensuring that the Board properly invoked its own jurisdiction, the Superior Court also invoked "hypothetical jurisdiction" to decide the case on the merits by saying:

> "An independent review of the administrative record discloses that the weight of the evidence supports the administrative decision to terminate petitioner's employment because of his unauthorized absence from work." (App. 31-32).

Petitioner made a request to the Superior Court to provide findings of fact and conclusions of law, in writing, especially on the issues of the Board's jurisdiction. See California Code of Civil Procedure § 632. (App. 46). The Court did not provide findings of fact and conclusions of law on the requested issues. (App. 31-33). Statement of findings of fact and conclusions of law is mandatory and such findings and conclusions must be in sufficient detail and exactness to indicate factual basis for the ultimate conclusion reached by the court. *Acme Boat Rentals, Inc. v. J. Ray McDermott & Co.,* 407 F.2d 1324, 1325 (5th Cir. 1969).

The Court of Appeal had jurisdiction on appeal, not to decide the merit of the case but merely for the purpose of correcting the error of the Superior Court and the Board in entertaining the merits of the case due to jurisdictional

defect. See, e.g., *Steel Co., supra,* 523 U.S. at 94-95. Without reviewing ALJ's report to find complete failure on the part of the Board to determine and establish two due process prerequisites to confer its own jurisdiction, the Court of Appeal stated:

> "As [counsel of] employer points out, the evidence showed employee *was* served with notice, and that the Board received the accusatory pleading, as shown by its minutes of July 31, 1998." (Italics in original.) (App. 9).

These remarks were made based upon the Board's counsel's assertion of the following statement, without citing to the record, on page 35 of the respondents' brief:

> "[T]here is [a] proof the Department complied with the requirement of filing the Form 77 Notice of Discharge [or accusatory pleading] with certification as to service with the Board of Civil Service Commissioners."

An obvious question comes to petitioner's mind as to why the respondents' counsel did not include the conformed copy of the accusatory pleading in the administrative record, or at worst made a request for a judicial notice of the conformed copy of the accusatory pleading. Assuming *arguendo* purely based upon the respondents' counsel's statement that the City properly served and filed an accusatory pleading alleging full statement of statutory disciplinary code violations, corresponding penalties and the facts leading up to petitioner's discharge, however, this still leaves non-compliance of the first of the two due process prerequisites to suggest that the Board could confer its own jurisdiction. Thus the Court of Appeal's decision, that the Board did not act in excess of jurisdiction, is erroneous. (App. 9).

This Court made the procedure very clear in *Commissioner v. McCoy*, 484 U.S. 3 (1987) in the cases in which the court of appeals reviews the administrative agency decision. This Court held that in reviewing the Board's decision, the duty of the court of appeals is to consider whether the Board committed an error. Plainly, the court of appeals lacks jurisdiction to decide any issue on behalf of the Board, that was not subject to the Board's proceeding or adjudication. See, e.g., *Id.* at 6. So in the case at bar, the Court of Appeal was not empowered to play the role of the trier of the facts and adjudicate the controverted constitutional issues of facts to establish the Board's jurisdiction retrospectively. Since the Board had neglected to determine its own jurisdiction, the proper procedure was to remand it back to the Board with an instruction to determine and establish the triable issues of the two due process prerequisites to confer its own jurisdiction. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982); see also, e.g., California Code of Civil Procedure § 1094.5(a) at App. 47.

A decision by this Court is needed to resolve the issue of "hypothetical jurisdiction," when it is invoked at every level of the proceedings, and especially when the constitutional issues are involved.

II. The Decision Based Upon The Court Of Appeal's Own Factual Findings, That The City Complied With *Skelly* Hearing Notice Requirements, Is Contrary To All The Holdings Of This Court On The Issue Of Due Process Of Law.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). Some form of hearing is required before an individual is finally deprived of a property [or liberty] interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

It has long been established by this Court that a permanent civil service employee, such as petitioner Arora, possesses a vested "property" interest protected by the Due Process Clause of the constitutional guarantee while employed. See *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974). This Court in *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972), and the California Supreme Court in *Skelly, supra,* 15 Cal.3d 194, at 206-207, held that the public employees must be afforded preremoval due process disciplinary hearing to safeguard their "property" interest in employment.

Petitioner's employer, the Department of Transportation of the City of Los Angeles, has promulgated a procedure outlined in § 251 of the Manual of Policies and Procedures to afford a predischarge due process disciplinary hearing especially emphasizing that the opportunity to response shall be a minimum of five working days or a minimum of seven calendar days following delivery of the notice of adverse action. (App. 40). The City named this

hearing as *Skelly*. *Ibid.* The California Legislature mandates that any period of notice and any right of duty to do any act or make any response must be extended by 5 days upon service by mail if served within the State of California. See California Code of Civil Procedure § 1013(a). (App. 47). Thus the City's own law and the California law mandate, for a *Skelly* hearing, an absolute minimum of 12 calendar days *Skelly* notice, if served through the mail.

In the case at bar, serving the *Skelly* hearing notice, dated June 15, 1998, through mail for a hearing on June 19, 1998, did not allow minimum of a 12-day statutorily required notice. It was only 4 days, and furthermore the notice was not received until one day after the hearing. The notice should have been mailed sufficiently in advance to permit the receipt of the notice, should have allowed petitioner to determine what is being proposed, and what petitioner must do to prevent the deprivation of his interest. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

The Court of Appeal rendered its opinion by stating that the June 15, 1998 *Skelly* hearing notice for a hearing on June 19, 1998, which was received by mail on June 20, 1998, complies with the due process of law as articulated in *Skelly, supra*, 15 Cal.3d at 215. (App. 37). The opinion also suggested that the May 29, 1998 letter, which did not mention and offer any opportunity to be heard including the resolution of the grievances, be treated as a *Skelly* notice also. *Ibid.* These reasonings are contrary to the spirit of the Fourteenth Amendment.

The Court of Appeal further justified its decision by relying on two California authorities (App. 38): (1) *Bussey v. Los Angeles Civil Service Commission*, 72 Cal.App.3d

912 (1977), in which, although the petitioner overlooked the *Skelly* hearing notice after having received it, however, the petitioner did attend the *Skelly* hearing after being notified over the phone. *Id.* at 921-922. In the case at bar, the notice was received late, and no one informed petitioner over the phone about the hearing to supplement defective service of the *Skelly* notice. Therefore, *Bussey* is distinguishable. (2) *Mims v. Los Angeles Community College Dist.*, 117 Cal.App.3d 352 (1981), in which, the court held that a post-termination trial-like hearing is a substitute of a *Skelly* hearing under special circumstances. *Id.* at 356-357. This is certainly contrary to this Court's holding described as root requirements of the Due Process Clause. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1984). This Court held, "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 542. (Italics in original.) Even the 9th Circuit held, "In the context of process due a terminated public employee, a full post-deprivation hearing does not substitute for the *required pre-termination* hearing. . . . [S]ubsequent proceedings [same as a trial-like-hearing] cannot serve to *eliminate* the essential requirements of a pre-termination notice and opportunity to respond." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 332 (9th Cir 1995). (Italics in original.) So, *Mims* is not a good decisional law.

The Court of Appeal also suggested that the constitutional infirmity is removed as petitioner had not brought the issue of untimeliness of the *Skelly* hearing notice to the authorities' attention. (App. 37). Factually it is incorrect. See *supra*, at page 5. Furthermore, this is contrary to this Court's holding. See, e.g., *Armstrong, supra*, 380 U.S. at 550-52.

Furthermore, petitioner was deprived due process right to raise any objections, at the Court of Appeal level, as the decision was rendered concurrently while denying the petition for rehearing. As the Court of Appeal's decision conflicts with this Court, a decision by this Court is needed to resolve the conflicts.

III. California Court Of Appeal's Decision Is Repugnant To The Due Process Of Law As Applied In *In Re Ruffalo*, 390 U.S. 544 (1968)

A lawyer, who had been charged with misconduct *In Re Ruffalo*, 390 U.S. 544 (1968) in a disbarment proceeding, was entitled to procedural due process, which included a fair notice of the charges stated on the accusatory pleading. *Id.* at 550. Disbarment is adversary proceedings of a quasi-criminal nature. *Id.* at 551; quoting *In re Gault,* 387 U.S. 1, 33 (1967). The charges must be known through stating on the accusatory pleading before the Board's administrative proceedings commence, otherwise they become a trap, when after they are underway, the Board takes an adverse decision based upon the unknown charges. See *ibid.*

Just as in the case of *In Re Ruffalo*, the City Charter § 112(a) and Personnel Department Policy 33.1F3 also require that alleged violation of the statutory disciplinary codes be stated sufficiently specific to state a cause of action and allow petitioner to rebut or challenge at the time of the administrative proceedings. (App. 41-42).

In the case at bar, the City did not write even a single word, under the non-statutory title of a cause of action *"Absent Without Valid Leave,"* on the accusatory pleading. The Board's reliance of Count (1) and Count (2) legal

theories of quasi-criminal nature of petitioner Arora's discharge to state a cause of action, which were not alleged on the accusatory pleading, constitutes a procedural due process violation. The accusatory pleading provides a constitutionally required notice to the petitioner accused of the standards by which his conduct is to be measured. It permits discipline to be imposed only for violation of an ascertainable standard of conduct.

The Court of Appeal did not provide reasons, grounds, or principles upon which its decision was based, contrary to the provision of California Constitution, Art. 6, § 14, except making cursory remarks that, "[A]bsent without a valid leave, was a reason for discharge listed in Department's Manual of Policies and Procedures." (App. 7-8). So, it appears that the Court of Appeal did not feel it necessary for the City to write statutory disciplinary charges of Counts (1) and (2), the degree of offense, corresponding penalties, and the facts leading up to petitioner's discharge on the accusatory pleading.

The judgment below conflicts sharply with the due process of law as this Court declared in *In Re Ruffalo*. A full hearing therefore should be granted so that this Court may consider the grave constitutional issues posed by this contradiction.

IV. Taking Of A Judicial Notice Of A Disputable Fact Of The Board's Jurisdiction By The Court Of Appeal Conflicts With This Court's Relevant Decision And Offends Due Process Of Law

This Court held that an appellate court should not substitute its interpretation of the evidence for that of the

trial court. See *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 857 n.19 (1982). If the District Court failed to consider relevant evidence, which would have been an error of law, the Court of Appeals, rather than making its own factual determination based upon judicial notice, should have remanded for further proceedings to allow the trial court to consider the evidence. *Ibid.*

In the case at bar, the respondents requested for a judicial notice of the government record of the Minutes for July 31, 1998 Regular Meeting of the Board, and the Court of Appeal took a judicial notice over petitioner's timely objection. Through looking at the pertinent part of the minutes of the meeting of the Board of Civil Service Commissioners (CSC), it appears that the Board's clerk had made an entry in the log book, indicating filing of an unknown document and an administrative appeal on June 24, 1998. See, *supra* at page 8. What was that unknown document? It is still a mystery. Did someone, in fact, file a document, or did the clerk make a mistake showing an entry, while none was filed? That unknown document, if any, is not a part of the administrative record, filed by the Board with the Court of Appeal. The Board also acknowledges the non-existence of the unknown document. In support of this assertion, Sylvia Trowbridge, the custodian of the administrative record, filed a declaration at the trial court level. The declaration indicated that no one ever filed any accusatory pleading on or about June 24, 1998. By the Board's own admission, the nature of the unknown document is disputable. It cannot be readily determined, and the type of the document is highly questionable. Even if such an unknown document exists, it cannot be a candidate of a judicial notice. See *Federal Rules of Evidence*, *Rule* 201(b). (App. 48-49).

Even now petitioner does not know the particulars or the evidential facts of which the Court of Appeal took judicial notice, and on which it rested its conclusion by saying that, "*The Board Did Not Act In Excess of its Jurisdiction. . . .* " (Italics in original.) (App. 9).

Counsel's statement, on page 35 of the respondents' brief filed with the Court of Appeal, that there is a proof that the City or the Department properly served and filed an accusatory pleading with the Board, on June 24, 1998, alleging statutory disciplinary charges, corresponding penalties, and facts leading up to petitioner's discharge for a cause of action, "*Absent Without Valid Leave,*" is in fact, without a proof.

Granting of a request for a judicial notice merely based upon the counsel's statement, without any evidentiary support, is a violation of due process. See, e.g. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302 (1937). Not only are the facts unknown of the unknown conformed copy of the accusatory pleading; there is no way to find them out. See, e.g., *ibid.*

The proper thing for the Court of Appeal was to remand back to the Board to make the necessary factual findings of its own jurisdiction as statutorily required. This Court intervention and review is mandatory.

CONCLUSION

Upon the facts and authorities set forth above, Arora respectfully submits that a Writ of Certiorari be issued to review the Judgment of the California Court of Appeal.

Date: July 23, 2002

Respectfully submitted,

NARESH C. ARORA
Chase Street, # 139
Canoga Park, CA 91304-2636
(818) 341-7487
Petitioner *Pro Se*

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

NARESH ARORA,

Plaintiff and Appellant,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES,

Defendants and Respondents.

B141389

(Super. Ct. No. BS 055816)

(Filed Feb. 7, 2002)

Appeal from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Naresh Arora in Propia Persona.

James K. Hahn, City Attorney, Leslie E. Brown, Assistant City Attorney, and Zna P. Houston, Deputy City Attorney, for Defendants and Respondents.

Naresh Arora (employee) was discharged from his job with the City of Los Angeles (employer) for being absent

without valid leave. He pursued his administrative remedies, but the Board of Civil Service Commissioners (Board) ultimately found in employer's favor. His petition for a writ of administrative mandamus was denied, and his cause of action for violation of civil rights was also dismissed. He now seeks review of the trial court's decision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

From 1988 to 1998, employee worked for employer's Department of Transportation (the Department) as an engineering assistant and then as an engineering associate. His employment led him to sue his employer for reasons related to taking family leave (the first lawsuit). While that suit was proceeding, he was transferred to a different section, where his supervisor was Brian Gallagher. He reported to Gallagher on May 14, 1998, following an illness. A week later, after Gallagher orally warned him about the quality and quantity of his work, he left early, on May 21. The next day, he called in sick. On the next workday, May 26, he called and told Gallagher he was sending Gallagher a facsimile message. That facsimile message, a letter dated May 25, stated that he would not return to work until John Federle, the Department's Personnel Officer, made his working conditions "humanly bearable." Employee sent a copy of this demand to Federle as well as to Gregory Orland, a Deputy City Attorney representing employer in the first lawsuit.

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[1] We recite facts taken from the Respondent's Appendix and the appellant's Appendix in Lieu of clerk's Transcripts.

According to employer's personnel manual, employee was required to take certain steps in order to be absent with leave. For example, if he was going to be gone for more than three days because of illness, he needed a doctor's note upon his return, and he also needed to check in with his employer on a daily basis. Gallagher contacted employee and reminded him of these requirements. Employee did not follow these requirements. Instead, his attorney in the first lawsuit sent a letter to Federle and Orland demanding certain changes to employee's working conditions, and accusing Gallagher of certain demeaning and "subhuman" behavior. Employer, via Gallagher, reminded employee that he would be considered absent without valid leave if he did not make a daily report to his employer, and that he could lose his job if he did not comply.

Things continued in this vein until employee had been absent without approved leave for a month. At that point, Gallagher went to employee's home and posted a "Notice of Discharge" on the door after employee failed to answer his knock. The next day, employee filed an "Appeal from Discharge" with the Board.

The Board set an administrative hearing (a "*Skelly* hearing")[2] and notified the parties of applicable procedures. At employee's attorney's request, the hearing was continued, and employee asked the Board to issue subpoenas duces tecum and appearance subpoenas to six Department employees, and to Orland. These subpoenas asked for some materials that appeared to be irrelevant

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[2] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

and/or privileged attorney/client communications. Employer moved to quash all or some portion of the subpoenas duces tecum for four of the employees, and, as to two employees, simply responded that there were no responsive documents.

The hearing was set for October 1, 1998, and the motion to quash was scheduled to be heard at the beginning of the hearing. Employee's attorney sent the hearing officer, Sylvia Trowbridge, a letter setting out his requirements for the hearing, including that (1) the hearing only address preliminary issues, (2) he be allowed to videotape the proceedings, (3) he be allowed to bring associates, (4) only one witness as a time be allowed to attend the hearing, and (5) he immediately be given a copy of the polices [sic] and procedures manual and charter and civil service rules.

At the hearing, Trowbridge denied employee's request to videotape the proceedings, indicating that there would be only one official transcript of the hearing. In addition, she also said that the hearing would proceed that day, and warned employee that if he failed to put on any evidence, he could lose his case. Employee and his attorney simply objected to the Department being represented by a city attorney, and that they could not videotape the proceedings. They left, and did not put on any evidence. However, the Department remained and put on its case.

On October 28, 1998, the hearing officer filed a report with the Board recommending that employee's termination be upheld. Both parties were given a copy of the report and told that the Board would consider the matter on November 13, and that exceptions to the report should be filed no later than five days before the Board's hearing.

One day before the hearing, employee faxed the Board a letter of exceptions and requested a continuance due to his attorney's unavailability. Neither employee nor an attorney on his behalf attended the November 13 hearing, and the Board adopted the hearing officer's recommendation upholding employer's termination of employee's employment.

Employee, following the administrative procedure, made a demand for reinstatement, which was denied. He then filed a petition for a writ of administrative mandamus. He contended that his procedural due process rights had been violated, and also that the hearing officer's recommendations were not supported by the evidence. In connection with the petition, he sought further discovery, which the trial court denied, restricting him to the administrative record as a basis for the hearing on his petition.

Employee then amended his petition to add a cause of action for violation of 42 U.S.C. sections 1983 and 1988, and named some additional defendants. The trial court denied the amended petition, and dismissed the new cause of action. Employee's motion for a new trial was also denied.

CONTENTIONS ON APPEAL

Employee contends that the record shows that he was denied due process before he was terminated from employment, and that he was terminated in retaliation for exercising his constitutional rights. He further contends that the Board acted in excess of its jurisdiction and in violation of the city's charter, that it did not proceed in the manner required by law, its decision was not supported by

the findings, and that the evidence does not support its findings.

Employee also contends that he was denied his constitutional rights to compel attendance of witnesses, to cross-examine them at the administrative proceeding, to be heard, and to a continuance so that he could be represented by counsel. In addition, he contends the trial court lacked subject matter and personal jurisdiction over his 42 U.S.C. sections 1983 and 1988 causes of action, and that it wrongfully dismissed such causes of action. Finally, he contends the trial court erred by denying his motion for a new trial, and by failing to provide him with a statement of decision.

DISCUSSION

1. *Standard of Review*

In ruling on a petition for a writ of administrative mandamus, the trial court reviews the administrative record to determine whether the agency's decision is supported by substantial evidence in light of the whole record. (*Sierra Club* v. *California Coastal Com.* (1993) 12 Cal.App.4th 602, 610; *California State Auto. Assn. Inter-Ins. Bureau* v. *Garamendi* (1992) 6 Cal.App.4th 1409, 1418.) The court must consider all relevant evidence in the record, but " '[i]t is for the agency to weigh the preponderance of conflicting evidence. [Citation.] Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.' " (*Sierra Club* v. *California Coastal Com., supra,* 12 Cal.App.4th at p. 610, italics omitted, quoting *McMillan* v. *American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 186.) "The standard of

review for [the appellate] court is identical: We, too, determine whether substantial evidence supports the administrative decision. [Citation.]" (*Eden Hospital Dist.* v. *Belshe* (1998) 65 Cal.App.4th 908, 916 and cases cited there.) If no challenge to the factual findings is made, an appellate court need only determine whether the administrative agency's ruling was so arbitrary and capricious as to amount to an abuse of discretion. (*Ibid.*)

Here, the Board found employee was fired for being absent without a valid leave. In other words, employee did not met [sic] his burden of proving he was entitled to reinstatement. The question before the trial court, and before us, is whether there is substantial evidence to support the administrative determination. In addition, we independently review the legal question of whether employee's procedural rights were violated during the hearing process, although to the extent such issues depend on conflicting evidence as to the underlying facts, we defer to the agency's and/or lower court's factual determinations, and assume the facts were such as support the lower tribunals' determinations. (*Mission Housing Development Co.* v. *City and County of San Francisco* (1997) 59 Cal.App.4th 55, 73.)

2. *Employee Was Not Denied Due Process Before Being Terminated*

Due process is simply notice and an opportunity to be heard. (*Gamet* v. *Blanchard* (2001) 91 Cal.App.4th 1276, 1286.) Employee was given due process. He was given notice of the various hearings, and an opportunity to participate. He was told the reason for his termination. This reason, absence without a valid leave, was a reason for discharge listed in Department's Manual of Policies

and Procedures. The evidence showed he was warned that termination could be the penalty if he failed to return before a certain date, and the applicable section of the Manual, dated 6/96, made it clear not only that the penalty of discharge was a possibility, but that an employee absent for more than seven days could be considered to have abandoned his or her job.

Employee's failure to participate in the hearing, given that he received notice and an opportunity to be heard, does not constitute a denial of due process. (*Britz, Inc.* v. *Dow Chemical Company* (1999) 73 Cal.App.4th 177, 185.) When employee left the hearing before the Board because he was unhappy with the procedure being used, he was not denied due process. And, because he left the hearing and did not participate, he failed to raise the issue of whether the notice of his hearing pursuant to *Skelly* v. *State Personnel bd., supra,* 15 Cal.3d 194 (the notice left on his door) was adequate or not, and thus waived that issue.

Even if he had raised the issue before the board, the evidence before the hearing officer was such that the Board could have found that the *Skelly* notice was adequate. Employee admitted he received the notice taped to his front door, and, in fact, he filed a request for a hearing the next day. Thus, his situation is factually distinguishable from *Shannon* v. *City of Los Angeles* (1928) 205 Cal. 366, the case on which employee relies. In that case, the employee never received written notice of the charge against him, and the evidence showed the notice was sent to an address at which he had never resided. Here, it is readily apparent that employee received notice, and that the requirement of due process was met: employee knew

the charge against him and had an opportunity to respond to the charge.

3. *The Evidence Showed that Employee Was Terminated for Being Absent Without Valid Leave*

The evidence presented to the hearing officer showed that employee was absent without valid leave. The Board accepted this evidence, too. As noted above, "'[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.'" (*Sierra Club* v. *California Coastal Com., supra,* 12 Cal.App.4th at p. 610, quoting *McMillan* v. *American Gen. Fin. Corp., supra,* 60 Cal.App.3d 175, 186.) Here, a reasonable person *could* reach the conclusion reached by the Board; accordingly, we must affirm.

4. *The Board Did Not Act in Excess of its Jurisdiction or in Violation of the City's Charter and Its Decision Was Supported by the Evidence*

Employee apparently thinks the board acted in excess of its jurisdiction because he was never properly served with notice of discharge, and because "the administrative record is completely silent if the accusatory pleading was ever filed with the board," both procedural requirements set out in the City Charter. As employer points out, the evidence showed employee *was* served with notice, and that the Board received the accusatory pleading, as shown by its minutes of July 31, 1998. Its decision that employee was terminated for being absent without valid leave was

made in compliance with the applicable procedure, and was fully supported by the evidence.

5. *Employee Was Not Denied Any Constitutional Rights*

Employee also contends that he was denied his (1) constitutional right to compel attendance of witnesses and to cross-examine them at the administrative proceeding, (2) right to be heard, and (3) right to a continuance so that he could be represented by counsel. These contentions are without merit. Employee had the right to call witnesses, and, in fact, Board issued subpoenas to compel their attendance. He was not precluded from cross-examining them as to relevant matters. Furthermore, employee points to no authority that he had an absolute right to a continuance when he requested a continuance at the last minute with no good reason for such delay. On this record, we find no procedural actions that deprived him of any constitutional rights.

6. *The Trial Court Had Jurisdiction Over the 42 U.S.C. Causes of Action, and Properly Dismissed Such Causes of Action*

Employee contends that the trial court lacked personal and subject matter jurisdiction over his causes of action for violation of 42 U.S.C. sections 1983 and 1988, as set out in his amended petition. This contention is patently without merit. First, by filing the amended petition seeking relief for such violation, he consented to personal jurisdiction. (*In re Marriage of McDonough* (1986) 183 Cal.App.3d 45, 52.) Furthermore, state superior courts have concurrent subject matter jurisdiction over such

claims. (*County of Los Angeles* v. *Superior Court* (1998) 68 Cal.App.4th 1166, 1170.)

Because the evidence in the administrative record showed that employee was terminated for being absent without valid leave, it follows that he was not terminated for exercising protected constitutional rights. If he was not terminated for exercising protected constitutional rights, his section 1983 and 1988 causes of action were not viable, and the trial court properly dismissed them. (See *Mata* v. *Superior Court* (1993) 20 Cal.App.4th 141, 149-150 [a tort action pursuant to 42 U.S.C. § 1983 based on allegedly wrongful termination is not authorized unless an employee prevails in his or her petition for administrative mandamus on such issue].)

7. *The Trial Court Did Not Err as to the Statement of Decision*

Employee contends that the trial court was required to provide a statement of decision with findings for all controverted facts. Here, the trial court stated that its tentative decision would be deemed its statement of decision, a technique allowed by California Rules of Court, rule 232(a). Contrary to employee's assertions, the statement of decision specifically stated that the court had independently reviewed the administrative record, and concluded that the weight of the evidence supported the Board's decision, thus showing the trial court applied the correct standard of review. In addition, by so stating, the trial court's statement of decision incorporated by reference the findings of ultimate fact made by the Board, making it sufficiently detailed. (*Angelier* v. *State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 597.)

8. *The Trial Court Did Not Err by Denying the Motion for a New Trial*

Employee contends the trial court erred by not granting his motion for a new trial. There are certain statutory bases for granting such a motion. (Code Civ. Proc., § 657.) Although employee raised many of them in his motion, upon review, we find no basis upon which the trial court should have granted the motion.

DISPOSITION

The judgment is affirmed. The defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

We concur:

KLEIN, P. J.
KITCHING, J.

CITY OF LOS ANGELES
CALIFORNIA

[Names And Addresses Omitted In Printing]

NOTICE

October 28, 1998

To: Appellants: Naresh C. Arora
21616 Califa Street, #217
Woodland Hills, CA 91367

Respondent: Department of Transportation

Re: Appeal from Discharge as a Transportation Engineering Associate I. Commission File No. 49249

You are hereby notified that the Report of the Board's Hearing Examiner following her conduct of a hearing on October 1, 1998, was filed on October 27, 1998 and will be presented to the Board for its consideration at 8:30 a.m. on Friday, November 13, 1998, in Room 350, Personnel Building, 700 E. Temple Street, Los Angeles.

Exceptions to any part or all of the Report should be filed in *writing* not later than five days prior to November 13, 1998. *Provide copy of exceptions to the opposing party.*

Very truly yours,

BOARD OF CIVIL SERVICE
COMMISSIONERS

/s/ Sylvia G. Trowbridge
Sylvia G. Trowbridge
Executive Assistant-Secretary

SGT:jw

Orig: Raj D. Roy, Appellant Representative
c: Thomas K. Conner, General Manager
John Federle, Personnel Officer
City Employees' Retirement
System/Emp.Nos.384789669
Diane N. Wentworth, Assistant City Attorney
✓Naresh C. Arora, Appellant
Jill Klein, Hearing Examiner

BOARD OF CIVIL SERVICE COMMISSIONERS
CITY OF LOS ANGELES

HEARING EXAMINER'S REPORT
Commission File No. 49249

APPELLANT:	Naresh C. Arora Transportation Engineering Associate I 21616 Califa Street, #217 Woodland Hills, CA 91367
APPELLANT'S REPRESENTATIVE:	Raj D. Roy, Esq. Attorney at Law 8345 Reseda Boulevard, Suite 222 Northridge, CA 91324
DEPARTMENT:	Transportation
DEPARTMENT'S REPRESENTATIVE:	Hazel C. Smalley, Esq. Deputy City Attorney Department of Water and Power 111 North Hope Street, Suite 340 P.O. Box 111 Los Angeles, CA 90051-0100
ACTION TAKEN:	Discharge
HEARING EXAMINER:	Jill Klein
DATE AND PLACE OF HEARING:	October 1, 1998 Department of Personnel Building 700 East Temple Street Los Angeles, California 90012
COMMISSION EXECUTIVE ASSISTANT/ SECRETARY:	Sylvia G. Trowbridge

REPORTED BY: David R. Cherry

TO: Board of Civil Service Commissioners

FROM: Jill Klein
Hearing Examiner

SUBJECT: Appeal from Discharge of Naresh C. Arora
Transportation Engineering Associate I
Department of Transportation
Discharge Effective June 23, 1998
Commission File No. 49249

CAUSE OF ACTION

Absent without Valid Leave

EXHIBITS

Introduced by the Department:

1. Notice of Discharge, Suspension, or Probationary Termination, plus Attachments
2. Manual of Policies and Procedures Section 252: Disciplinary Action Penalties
3. Notice to Correct Deficiencies, dated June 27, 1997
4. Memorandum, dated April 23, 1997
5. Memorandum, dated May 21, 1998
6. Letter to Brian Gallagher from the Appellant, dated May 25, 1998
7. Letter to Brian Gallagher from the Appellant, dated May 28, 1998
8. Letter to John Federle from Raj D. Roy, dated May 25, 1998

9. Letter to John Federle from Raj D. Roy, dated May 28, 1998

10. Letter to Raj D. Roy from Gregory P. Orland, dated May 29, 1998

Introduced by the Appellant:

The Appellant did not attend the hearing, and therefore did not introduce any exhibits.

SKELLY REQUIREMENTS

The Appellant did not attend the hearing; thus, no *Skelly* objections were raised. *See, Skelly v. State Personnel Board*, 15 Cal. 3d 194 (1975).

EMPLOYEE BACKGROUND INFORMATION

Appellant Naresh C. Arora was hired by the Respondent Department of Transportation as a Transportation Engineering Assistant I on December 11, 1988. On July 1, 1990, he was promoted to the position of Transportation Engineering Assistant II. On November 18, 1990, the Appellant was promoted to the position of Transportation Engineering Associate I.

On April 23, 1997, the Appellant received an oral warning regarding unacceptable behavior at a staff meeting that was held on April 10, 1997 (Department's Exhibit 4). The Appellant received a Notice to Correct Deficiencies dated June 27, 1997 for neglect of duty (Department's Exhibit 3). On May 21, 1998, the Appellant was given an oral warning for insufficiently performing assigned duties and requiring an excessive amount of supervision. *See,* Department's Exhibit 5.

WITNESSES

Called by the Department:

1. John Federle, Personnel Officer
2. Gina Tervalon, Senior Personnel Analyst II
3. Brian Gallagher, Transportation Engineer

Called by the Appellant:

The Appellant did not attend the hearing, and therefore did not call any witnesses.

CIRCUMSTANCES LEADING TO DISCHARGE

As set forth above, on May 21, 1998, the Appellant received an oral warning from his supervisor. The Appellant asked for, and received, sick leave for the rest of the day. The Appellant and his attorney subsequently communicated with the Department by voice mail and written correspondence; however, the Appellant never returned to work and never requested additional leave. The Department discharged the Appellant effective June 23, 1998, for being absent without valid leave.

POSITION OF THE DEPARTMENT

The Department contends that immediately prior to his discharge, the Appellant was absent without leave for approximately 21 days. Although he was sent a warning letter that instructed him to follow reporting procedures, he neither responded nor returned to work. When the discharge of the Appellant was proposed, he again failed to respond, and did not attend a *Skelly* meeting. The Department asserts that because the Appellant was absent

for an extended period of time without leave, his discharge should be sustained.

POSITION OF THE APPELLANT

Prior to the hearing, the attorney of the Appellant requested that he be allowed to videotape and audiotape the proceedings. When I denied said request during the pre-hearing conference, he and the Appellant chose to not [sic] participate in, or attend, the hearing. The hearing proceeded in their absence.

FINDINGS

I find that the Department has sustained the cause of action contained in the Notice of Discharge, Suspension, or Probationary Termination; namely, absence without valid leave.

DISCUSSION

Transportation Engineer Brian Gallagher testified as follows: He became the supervisor of the Appellant on May 11, 1998. Because of illness, the Appellant did not actually begin working under his supervision for a few more days. On May 21, 1998, Mr. Gallagher warned the Appellant that he was insufficiently performing his assigned duties and required excessive supervision. The Appellant asked that the warning be documented. Mr. Gallagher complied by writing a memorandum dated May 21, 1998 (Department's Exhibit 5). The Appellant then submitted a written request for sick leave for the remainder of the day, and left work. The request for sick leave was granted.

Mr. Gallagher further testified that: The Appellant never returned to work. On Friday, May 22nd, at approximately 5:30 a.m., the Appellant left a message on Mr. Gallagher's voice mail. Another voice mail message followed on Tuesday, May 26, 1998. The second message stated that the Appellant had faxed a letter to the Personnel Services Division of the Department the preceding day, and that Mr. Gallagher should read the letter.

Mr. Gallagher stated that he obtained a copy of the letter from the Personnel Division. The letter dated May 25, 1998 (Department's Exhibit 6) was addressed to him. It states, in pertinent part, that the Appellant could not report to work until Personnel Officer John Federle made working conditions "humanly bearable." In the letter, the Appellant asked Mr. Gallagher to stop retaliating against, discriminating against, and harassing him. The letter also states,

> Please make work conditions clean, healthy, and conducive to doing good technical work immediately. I will be able to return to work when that happens. Please call my attorney directly or through your represented counsel.

John Federle testified that he also received a letter regarding the Appellant dated May 25, 1998. The letter (Department's Exhibit 8) was written by Raj D. Roy, who is the attorney of the Appellant. In the letter, Mr. Roy asserted that the Appellant was being retaliated against for filing a lawsuit against the City, and that there was a plot to discharge his client from his employment with the Department. The letter contains six requests made by Mr. Roy on behalf of the Appellant. The letter also states that, "You are reminded that Mr. Arora will be able to go to

work only when the continuous harassment, and demeaning, subhumane [sic] behavior by Mr. Gallagher is stopped, and a written assurance as per this letter is acknowledged to be received by my office."

Mr. Gallagher testified that after reading the letter to him dated May 25, 1998, he asked Mr. Federle what he should do. He stated that Mr. Federle told him that he would take care of the matter. Mr. Gallagher further testified that he called the home of the Appellant on May 26th and May 27th, and on both occasions left messages on an answering machine. The message that Mr. Gallagher left was that the Appellant was considered absent without leave. He also informed the Appellant that if he was sick, he needed to submit a doctor's note for an absence in excess of three days.

By letter dated May 28, 1998 (Department's Exhibit 9), the attorney of the Appellant again wrote to Mr. Federle. The letter accuses Mr. Gallagher of harassing the Appellant by calling him on the phone, and states that the Appellant had made it very clear to Mr. Gallagher that he was to communicate with the Appellant only through Mr. Roy. The letter also states that the Appellant would feel safe to return to work only if he received a written apology for past harassment, and written assurance that Mr. Federle had taken control of the situation and would ensure that such incidents did not recur.

By letter dated May 28, 1998 (Department's Exhibit 7), the Appellant informed Mr. Gallagher that he still was awaiting a written response from Mr. Federle. The letter also states,

> After looking at this response, my representative and attorney will then determine if there is an

> apology for the hostile work environment that I faced, and whether Mr. Federle gives adequate written assurances for a good work atmosphere. If my representative is satisfied enough, he will advice [sic] me to go to work.

Mr. Gallagher testified that he again asked Mr. Federle what he should do, and again was told that Mr. Federle would handle the situation. He also testified that Mr. Federle instructed him to keep track of the absences of the Appellant.

By letter dated May 29, 1998 (Department's Exhibit 10), Deputy City Attorney Gregory P. Orland responded to the letter dated May 28, 1998, that Mr. Roy had sent to Mr. Federle. The letter states, in pertinent part, that,

> [Y]our client will not be supervised through attorneys. If your client wishes to take legal action, that is his prerogative. Otherwise, as long as your client is an employee of the City of Los Angeles, he is obligated to work through his supervisorial chain of command like any other employee. If he continues to refuse to speak or otherwise directly communicate with his supervisors, his department may take appropriate responsive action.

On May 29, 1998, Mr. Federle sent the Appellant a letter entitled "Absence Reporting Requirements" (Department's Exhibit 1, p. 5). In the letter, Mr. Federle reminded the Appellant that Section 234 of the Department's Manual of Policy and Procedures requires all employees to personally report to their respective supervisors, or other designated person, when they are going to be absent or tardy; that such reports are to be made on a daily basis prior to the beginning of the scheduled work

shift; and that failure to report, regardless of the reason for the absence, could result in loss of pay and/or the imposition of discipline. The Appellant also was reminded that if he was absent for three or more days due to illness, he was required to provide appropriate medical verification to his supervisor immediately upon his return to work. The letter also states that,

> Failure to follow proper reporting procedures will result in your being carried on an Absent Without Valid Leave status. If this situation were to continue, your employment status could be in jeopardy. We strongly encourage you to follow long established Department reporting requirements.

Mr. Gallagher testified that he received no further voice mail messages from the Appellant and no additional written communications. John Federle testified that Mr. Gallagher reported to him that the Appellant had not returned to work and had not communicate with him. Mr. Federle therefore sent the Appellant a Notice of Proposed Discharge dated June 15, 1998 (Department's Exhibit 1, pp. 3-4). The letter, in pertinent part, ordered the Appellant to either return to work immediately or submit his resignation. It also warned the Appellant that if he did not choose one such opinion by June 19, 1998, final consideration of his discharge would result.

The Notice of Proposed Discharge gave the Appellant the opportunity to respond either orally or in writing. If he wished to respond in person, he was given the opportunity to appear at a *Skelly* hearing scheduled for June 19, 1998 at 9:30 a.m. Senior Personnel Analyst II Gina Tervalon testified that she represented the Department at the *Skelly* hearing. She stated that the Appellant did not

attend the meeting or send a representative. She also stated that no correspondence concerning the meeting was received from the attorney of the Appellant. By letter to Mr. Federle dated June 19, 1998 (Department's Exhibit 1, p. 2), Ms. Tervalon detailed that on June 19, 1998, she was present in the office from 7:00 a.m. to 5:50 p.m., and that she checked the fax machine, the mail, and phone messages for a response from the Appellant or his representative. The letter also states that Ms. Tervalon asked the staff of the Records Unit if they had received any calls or correspondence from the Appellant or his representative, and was told that they had not. The letter closes by recommending that the proposed discharge of the Appellant be imposed.

Mr. Federle stated that the letters that Mr. Roy had sent to Mr. Federle on behalf of the Appellant did not adequately notify the Department of the reasons for the absence of the Appellant. He testified that because the Appellant and his attorney subsequently had been warned that the Appellant needed to report his absences to his supervisor, and had failed to respond, he was of the opinion that the Appellant should be disciplined for his unexcused absence.

Based upon the foregoing evidence, I find that the Appellant was absent from work without leave from May 22, 1998, until his discharge on June 23, 1998. I find that on May 25th and May 28th, the Appellant and his attorney notified the Department that the Appellant felt that he was being mistreated by his supervisor, and that he would return to work only after his attorney had been assured by the Personnel Officer that working conditions would improve. I find that by letter dated May 28, 1998, a Deputy City Attorney informed the attorney of the

Appellant that, notwithstanding his charges against the Department, the Appellant was required to follow normal reporting procedures. In addition, the attorney was informed that the Appellant risked disciplinary action if he continued to be absent without leave. I find that by letter dated May 29, 1998, the Personnel Officer informed the Appellant that he was required to report his absences to his supervisor, and that he risked disciplinary action if he failed to do so. I find that despite receiving such warnings, the Appellant did not return to work and also did not communicate with his supervisor regarding his absence. I find that even when the Department proposed to remove the Appellant from his position based upon his unexcused absence, the Department received no response from either the Appellant or his attorney.

Even if one assumes *arguendo* that the Appellant has valid grievances against the Department, I find that such does not give him the right to absent himself from work and set conditions that the Department must meet before he will return to his job. I find that both the Appellant and his attorney were warned that he was expected to either be at work or to properly notify his supervisor regarding his continued absence. Because the Appellant chose to ignore said warnings, I find that the charge of absence without valid leave should be sustained.

APPROPRIATENESS OF PENALTY

John Federle testified that he prepared a Notice of Discharge (Department's Exhibit 1, p. 1), which subsequently was signed by the Assistant General Manager of the Department. He stated that in deciding upon an appropriate penalty, he consulted the Department's

disciplinary guidelines (Department's Exhibit 2). He noted that Section III(B) of the guidelines recommend a penalty ranging from a written notice to discharge for a first offense of "unexcused, excessive or patterned absenteeism." With regard to said charge, the guidelines also state that,

> When an employee is absent without authorization for seven or more consecutive days, the absence may be considered a "resignation" under Civil Service Commission Rule 7.2 (abandonment of position). Nothing in this section shall prevent an appointing authority from suspending or discharging an employee on the account of unauthorized absence.

Mr. Federle also noted that for the offense of "failure to make reasonable effort to notify supervisor of inability to report for work" the guidelines at Section III(C) recommend a penalty ranging from a written notice to a suspension of five days for a second offense. He testified that he considered the Appellant's failure to respond to his letter dated May 29, 1998, to be the first such offense, although no separate discipline had been issued. The second offense was the failure to respond to the Notice of Proposed Discharge.

Mr. Federle further testified that the Department consistently discharges employees who are absent without leave in excess of seven calendar days, using ten days as a rule of thumb. In the preceding six months, he knew of three employees who had been discharged for such offense. Mr. Federle noted that in the case at issue, the Appellant was absent without leave for approximately 22 consecutive work days. Based upon the foregoing reasons, Mr. Federle had decided that the penalty of discharge was appropriate.

I note that the Appellant has been employed by the Department since 1988, and thus has eleven years of tenure with the City. I also note that during that time, he was issued only three minor disciplinary actions, none of which was for absenteeism. I find that both of the above factors constitute mitigating elements.

In aggravation, I find that the Appellant was absent without leave for the month immediately preceding his discharge, and thus, in effect, abandoned his position. While I find that he also failed to keep his supervisor informed of his inability to report to work, I find that he never before has been disciplined for such offense. I therefore find that such charge should be treated as a first offense, and not as a second offense as was done by Mr. Federle. The guidelines recommend a penalty ranging from an oral warning to written notice for a first offense of failure to make reasonable effort to notify supervisor of inability to report to work.

I find that the offense of unexcused absence is the more serious of the two, and therefore find it appropriate to look to that section of the disciplinary guidelines for instruction. I find that the penalty of discharge falls within the range recommended in the guidelines. Based upon the testimony of Mr. Federle, I also find that the Department consistently discharges employees who miss at least ten consecutive days of work due to unexcused absence. I therefore find that such penalty is consistent with past practice in the Department. Based upon the foregoing, and especially upon the fact that the Appellant abandoned his position, I recommend that the penalty of discharge be sustained.

RECOMMENDED DECISION

I recommend that the Board of Civil Service Commissioners sustain the charge of absence without valid leave.

I recommend that the penalty of discharge be sustained.

Respectfully submitted,

/s/ Jill Klein
JILL KLEIN
Hearing Examiner

October 26, 1998

Filed: October 27, 1998

CITY OF LOS ANGELES
CALIFORNIA

[Names And Address Omitted In Printing]

December 9, 1998

Raj D. Roy, Esq.
Attorney at Law
8345 Reseda Blvd., Suite 222
Northridge, CA 91324

Re: Appeal from Discharge of Naresh C. ARORA, Transportation Engineering Associate I, Department of Transportation.
Commission File No. 49249

Dear Mr. Roy:

At its meeting of Friday, November 13, 1998, the Board of Civil Service Commissioners took action (finalized on November 26, 1998) to find that:

1. The cause of action be sustained; and

2. The penalty of discharge be sustained.

Any individual seeking judicial review of a suspension or discharge must seek such review within the 90-day period specified in California Code of Civil Procedure Section 1094.6.

Also within the same 90-day period hereinabove specified, the requirement of City Charter Section 112 1/2 must be satisfied prior to the filing of any court action.

You are hereby notified accordingly.

Very truly yours,

BOARD OF CIVIL SERVICE
COMMISSIONERS

/s/ Sylvia G. Trowbridge
by Sylvia G. Trowbridge
Executive Assistant-Secretary

SGT:jw

cc: Thomas K. Conner, General Manager
John Federle, Department Personnel Officer
City Employees' Retirement System/
Emp. No. 384789669
Diane N. Wentworth, Assistant City Attorney
✓Naresh C. Arora, Appellant
Jill Klein, Hearing Examiner

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

NARESH ARORA, Petitioner, vs. BOARD OF CIVIL SERVICE COMMISSIONSERS [sic], et al., Respondents.	CASE NO. BS 055816 ~~[PROPOSED]~~ JUDGMENT DENYING PETITION FOR WRIT OF MANDATE (Filed March 10, 2000)

This matter came on for hearing before this court on February 16, 2000 in Department 86 of the Superior Court, the Honorable David P. Yaffe, Judge presiding, pursuant to the verified Petition for Writ of Mandate of Naresh Arora, Petitioner. Naresh Arora appeared in pro per with associated in counsel William James Osborne; the Office of the Los Angeles City Attorney by Deputy City Attorney Zna Portlock Houston appeared as attorney for Respondents.

Respondents having served and filed their response to the petition, each party having submitted memoranda of points and authorities in support of their respective contentions, all administrative transcripts and exhibits introduced having been received into evidence and reviewed by the court, the court having reviewed the arguments and applied the independent judgment test, the matter having been submitted, the court rendered its decision as follows:

1. An independent review of the administrative record discloses that the weight of the evidence supports the administrative decision to terminate petitioner's

employment because of his unauthorized absence from work;

2. Petitioner makes numerous allegations of procedural error, abuse of discretion, and denial of a fair trial at the administrative level. All of said assertions are unsupported by the evidence, and most of them were not made at the administrative level; and

3. Two weeks before trial, after his opening brief had been filed, and on the same date that respondent's opposing brief was filed, petitioner without leave of court filed what purports to be a first amended petition together with what is denominated a civil action for damages due to deprivation of civil rights. The amendment, which is a confusing combination of factual allegations and legal argument blended together, without numbered paragraphs, alleges no new facts. It merely asserts the existence of additional remedies for the invasion of a single primary right, the (alleged) wrongful termination of petitioner's employment. California subscribes to the primary rights theory, under which the invasion of a single primary right gives rise to only a single cause of action. The court determines that petitioner's employment was properly terminated by respondent for unexcused absence from work and for no other reason. By virtue of this determination, petitioner has no cause of action against respondent and is entitled to none of the remedies requested in his amended pleading. Respondent is therefore entitled to a final judgment in this proceeding, which will be a bar to all of petitioner's requested relief.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The petition for Writ of Mandamus is denied;

2. Petitioner shall take nothing by this action;

3. Respondent, the City of Los Angeles, to recover costs from Petitioner Naresh Arora, in the sum of $___.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: MAR 10 2000

Judge David P. Yaffe
DAVID P. YAFFE
JUDGE OF THE SUPERIOR

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 3

DATE: June 8, 2001

Naresh C. Arora
21450 Chase Street
#139
Canoga Park, CA 91304

Naresh C. Arora
v.
Board of Civil Service Commissioners et al.

B141389
Los Angeles County No. BS055816

THE COURT:

Respondent's request for judicial notice granted.

NO CHANGE IN JUDGMENT
NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

NARESH ARORA, Plaintiff and Appellant, v. BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES, Defendants and Respondents.	B141389 (Super. Ct. No. BS 055816) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING (Filed Feb. 28, 2002)

THE COURT:

It is ordered that the opinion filed here on February 7, 2002, be modified as follows:

At page 2, second full paragraph, second line, delete "a month" and insert in its place "almost a month."

At page 2, second full paragraph, second line, insert the following two paragraphs after "almost a month" and before "At that point, Gallagher":

> By letter dated June 15, 1998 and entitled "Proposed Discharge – Absent without Valid Leave," Federle notified employee that employer's records showed employee had been absent without valid leave since May 22, 1998, and that this was sufficient cause for discharge. Employer's attempts to contact employee were

described, as were the previous warnings given to employee The letter told employee that failure to act in one of two ways by June 19, 1998 "will result in final consideration of your proposed discharge"; those two actions were to either report to work (and be subject to later discipline for being absent without valid leave) or submit a written resignation (using the enclosed resignation form).

The June 15 letter also invited employee to respond to charge of being absent without valid leave either in writing or orally. It informed him that there would be a hearing on June 19, 1998, a *Skelly* v. *State Personnel Bd.* (1975) 15 Cal.3d 194 hearing, at a specified location and time. It further warned him that if he had not taken one of the two described actions or responded by 4 p.m. on June 19, 1998, employer would proceed with the proposed discharge based on the charge of being absent without valid leave. Employee, who asserted that he did not receive the June 15 letter until June 20, 1998, did not attend the June 19 hearing or otherwise respond in any way.

On page 2, third full paragraph, first line, delete "(a "*Skelly* hearing")."

On page 2, third full paragraph, first line, delete the footnote 2 indicator.

On page 2, at bottom of page, delete the text of footnote 2.

On page 3, first full paragraph, third line, delete "Sylvia Trowbridge" and insert "Jill Klein" in its place.

On page 3, second full paragraph, first line, delete "Trowbridge" and insert "Klein" in its place.

On page 7, first full paragraph, seventh line, delete "(the notice left on his door)" and insert "(the June 15, 1998 letter)" in its place.

On page 7, second full paragraph, third line, delete "notice taped to his front door, and, in fact, he filed a request for a hearing the next day" and replace it with:

> the June 15, 1998 letter, albeit not until June 20, 1998. Upon its receipt, employee could have contacted employer and informed employer he had received the notice late, and asked for a *Skelly* hearing on a date after June 19, because of late receipt of the letter. He did not do so, either before or after he was officially terminated on June 23, 1998. Under *Skelly*, all that is required in the way of pre-removal safeguards is notice of the proposed action, the reasons therefore, [sic] a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (*Skelly*, *supra*, 15 Cal.3d at p. 215.) These requirements were met in this case. In addition to the June 15, 1998 letter, employee also had been given a May 29, 1998 letter warning him that if he failed to report his absence from work to his supervisor on a daily basis, he could be placed on an Absent without Valid Leave status, and his employment status could be in jeopardy.

On page 7, second full paragraph, at the end of the paragraph, following the sentence ending with "respond to the charge" insert the following material:

More on point are the cases of (1) *Bussey* v. *Los Angeles Civil Service Commission* (1977) 72 Cal.App.3d 912, 922, in which, although the employee failed to attend the *Skelly* hearing (having received but overlooked the notice of such hearing), the reviewing court concluded that *Skelly's* requirements were satisfied by the employer's earlier warnings and identification of the problem behavior and the result to which such behavior could lead, if not corrected, and (2) *Mims* v. *Los Angeles Community College Dist.* (1981) 117 Cal.App.3d 352, 357-358, in which the employee could have, but did not, raise the issue of the untimeliness of the pre-termination notice before the personnel commission that reviewed the decision to terminate.

Upon such modification, the petition for rehearing is denied.

Except as modified herein, the petition remains in full force and effect.

No Change in Judgment.

Court of Appeal, Second Appellate District, Division Three – No. B141389
S105255

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed May 1, 2002)

NARESH ARORA, Plaintiff and Appellant,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS et al., Defendants and Respondents.

Petition for review DENIED.

/s/ George
Chief Justice

§ 251 of a Manual of Policies and Procedures of the Department of Transportation, City of Los Angeles, California, states in relevant part for predischarge disciplinary hearing proceedings:

> An employee must be given a notice of the intended disciplinary action and an opportunity to respond to the charges by virtue of legal precedent mandates, which guarantees protection of the employee's Due Process rights. The employee will be given written notice which shall include completed and unsigned copy of the "Notice of Suspension, Probationary Termination or Discharge," (Form Gen. 77), along with copies of documents which bear the decision to impose discipline. The employee will be given reasonable time to review the transmitted documents. The employee will also be given an opportunity to rebut the charges or an explanation in defense either orally or in writing. *The opportunity to respond shall be a minimum of five working days following delivery of the notice.* This Due Process Hearing is referred to as a *Skelly* Hearing. (Emphasis added.)

Personnel Department Policy 33.1E: Same as predischarge disciplinary due process *Skelly* Hearing.

Personnel Department Policy 33.1F3 (Suspension or Discharge):

(a) Review "Notice of Discharge, Suspension or Probationary Termination" (Form Gen. 77) Be sure a full statement of the reason for the action is included.

(b) Obtain approval and signature of the appointing authority (only after step [33.1]E [*Skelly* Hearing] . . . has been completed).

(c) Give notice to the employee in person.

(1) * * *

(2) A discharge notice should be served personally, unless after a diligent search the employee cannot be found. If the employee cannot be personally served, the notice may be left at the employee's last known address. (Service by mail cannot be made except for a termination during probation.)

(d) Certify that the notice was served on the employee and return it as soon as possible to the departmental personnel office, which forwards the original copy to the Civil Service Commission. The action is effective only when the notice is filed with the Commission.

(Amended 7-22-77)

LOS ANGELES CHARTER SECTION 112(a)

Any board or officer having the power of appointment of officers, members and employees in any department of the government of the City shall have the power to remove, discharge or suspend any officer,

member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing, that such action is warranted. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing

board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same if he had not been removed, discharged, or suspended by the appointing board or officer.

RULE 12

DISCIPLINARY HEARINGS

* * *

Sec. 12.3. Hearings shall be conducted by hearing examiners pursuant to these Rules, Los Angeles Administrative Code Sections 19.29 through 19.35, and Personnel Department Policy 24. The following Rules 12.4 through 12.11 shall be a procedural guide for the hearing examiner in the conduct of a hearing.

Sec. 12.4. Any disciplinary hearing conducted pursuant to Charter Section 112 shall include, as the first order of business, a factual determination by the hearing examiner relating to the extent to which the appointing authority taking the action complied with the provisions of

Personnel Department Policy 33.1E and 33.1F3. The hearing examiner's determination shall be incorporated in the first section of the hearing examiner's report to the Board.

If the hearing examiner determines that the appointing authority has so complied, the appellant shall be requested to stipulate to this fact. Such stipulation, which should be included in the hearing examiner's report, is intended to expedite the substantive discussion of the merits of the disciplinary action and, when appropriate, the appellant's fitness and suitability.

* * *

Sec. 12.12. The hearing examiner's report to the Board shall include findings and recommendations relating to the appointing authority's compliance with Policy 33.1E and 33.1F.3, the adequacy of the evidence submitted in support of the charges, the sufficiency of the grounds for removal, discharge, or suspension, and, where the grounds are considered to be insufficient, the fitness and suitability of the employee.

* * *

Sec. 12.14. If exceptions to the hearing examiner's report are filed, the presiding officer of the Board shall state for the record that the written exceptions have been received as part of the record and shall be considered by the Board in connection with its evaluation of the report. Failure of any person to file exceptions within the time prescribed by Board Policy shall be deemed an admission of the facts stated in the report unless the Board, for good cause shown, relieves the person from such failure and permits the individual at or before the hearing to take exception to all or any part of the report.

Sec. 12.15. At the time the hearing-investigation is held before the Board, the first order of business shall be the Board's determination relating to the appointing authority's compliance with Personnel Department Policy 33.1E and 33.1F.3. If the Board finds compliance, no further review of the procedural issue will be allowed. If the Board does not find compliance, the appeal may be remanded to the hearing examiner or the Board may proceed with its hearing-investigation.

LOS ANGELES ADMINISTRATIVE CODE

Sec. 19.36. Consideration of Report by Board.

The board shall fix a time when the board will consider the report or reports. Notice thereof shall be mailed to each party and interested person not less than five days prior to the date fixed, unless it is otherwise stipulated; provided, however, that written notice may be transmitted through regular messenger service to any board, officer or employee of the city who is a party or interested person in the proceeding.

Not later than two days before such date any party may file written exceptions to any part or all of the examiner's or committee's report or reports, and if a decision has been proposed by the examiner or committee, may attach thereto a decision proposed to be substituted for that proposed by the examiner or committee, together with his written argument therefor. Any interested person may, by leave of the board, file exceptions, proposed conclusions and decision and argument. By leave of the board any

party or interested person may present oral argument to the board.

BOARD'S DISCIPLINARY APPEAL § 24.9

Exceptions shall be filed not less than five (5) calendar days prior to consideration by the Board and shall be provided by the filer to the opposing party. This section does not preclude oral presentations before the Board, which are provided pursuant to Civil Service Rule 12.14.

California Code of Civil Procedure:

Section 632: In superior . . . courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. * * *

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.

Section 1013(a): In case of service by mail, the notice or other paper shall be deposited in a . . . mailbox . . . or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at . . . that party's place of residence. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California . . . "

Section 1094.5 (a): Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior . . . board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. . . .

Section 1094.5 (b) states in pertinent part, "The [trial court's] inquiry [into the validity of final administrative order or decision] shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not

supported by the findings, or the findings are not supported by the evidence.

California Evidence Code:

Section 452 provides, in relevant part: Judicial notice may be taken of the following matters . . .

* * *

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

* * *

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Federal Rules of Evidence, Rule 201. Judicial Notice of Adjudicative Facts:

(a) Scope of rule: This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts: A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the

trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned

* * *

BOARD OF CIVIL SERVICE COMMISSIONERS CITY OF LOS ANGELES

Regular Meeting Friday, November 13, 1998

Room 350, Personnel Building, Los Angeles

EXCERPT FROM MINUTES

Excerpt from Discussion re Agenda Item 1.f., Unfinished Business, Appeal from Discharge of Naresh C. Arora. File No. 49249

* * *

PROCEEDINGS

PRESIDENT SCHUSTER: Naresh C. Arora, Transportation Engineering Associate I, Department of Transportation. Discharge effective June 23, 1998.

Report and recommendation of the Board's Hearing Examiner, Ms. Jill Klein, following her conduct of a hearing on October 1 into subject appeal of Mr. Arora.

The Hearing Examiner recommends that the Board find that the cause of action be sustained and the penalty of discharge be sustained.

May we have appearances.

MS. SMALLEY: Hazel Smalley, representing the Department of Transportation.

MS. TERVALON: Gina Tervalon, Department of Transportation.

MS. TROWBRIDGE: I provided to you this morning some faxes I received from Mr. Arora himself. Yesterday I

received the first fax considered to be his exceptions. And then he called to ascertain that they were received and asked that I sign, send it back, saying they were received, which I did.

And in that conversation, he asked about the procedure and whether he needed to appear and a number of other things. And I advised him that he had the option of appearing. And if he wanted to argue orally, he should appear. He didn't make it clear at that time. He said he would get back to me later. I told him to let me know.

Then later in the day I received another fax, which you also have. And in there he indicates he attempted to contact his counsel, and picking up the phone. And then he goes on as to what he wants me to provide the Commission, et cetera. But I think in that letter, I'm not sure whether he's asking for a continuance. I'd have to read it again, but –

COMMISSIONER MULKEEN: I don't think we should spend any more time on this. This is just ridiculous. I thought the Department of Transportation bent over backwards in this case.

COMMISSIONER KRANZ: Totally.

COMMISSIONER MULKEEN: And really went above and beyond the call of duty.

PRESIDENT SCHUSTER: Well, normally, if it's a discharge, I try and be a little more lenient. But I don't know that there is cause here.

COMMISSIONER MULKEEN: They don't show up for anything.

COMMISSIONER KRANZ: To me it's inexcusable.

PRESIDENT SCHUSTER: If there is a motion –

COMMISSIONER KRANZ: I will move to sustain the hearing officer's recommendations.

COMMISSIONER FLORES: Second.

PRESIDENT SCHUSTER: All in favor, aye.

(Motion voted unanimously.)

PRESIDENT SCHUSTER: Opposed no.

COMMISSIONER MULKEEN: Thank you.

MS. SMALLEY: Thank you.

Supreme Court, U.S.
FILED
AUG 29 2002
OFFICE OF THE CLERK

No. 02-148

In The Supreme Court of the United States

NARESH ARORA,

Petitioner,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES

ROCKARD J. DELGADILLO,
City Attorney
PATRICIA V. TUBERT,
Chief Assistant City Attorney
Counsel of Record
ZNA P. HOUSTON,
Managing Assistant City Attorney
200 North Main Street, 1800 City Hall East
Los Angeles, California 90012-4130
Telephone: (213) 485-6380

Attorneys for Respondents, Board of Civil Service Commissioners; City of Los Angeles

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the state appellate court can invoke "hypothetical jurisdiction" to render a valid and lawful judgment when the record discloses that an administrative agency lacks jurisdiction due to non-compliance of mandatory statutory code provisions involving the Due Process Clause of the Fifth and Fourteenth Amendments.

2. Whether the Due Process Clause of the Fifth and Fourteenth Amendments allows a public employer to terminate a permanent civil service employee without any opportunity to be heard "before termination." Further, whether the Due Process Clause of the Fourteenth Amendment allows the state appellate court to render a decision, after a timely petition for rehearing is filed, by affirming the decision of an administrative agency *and* denying the petition for rehearing.

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STATEMENT OF THE CASE

Petitioner, Naresh Arora, worked for the City of Los Angeles' Department of Transportation from 1988 to 1998. During his employment, he had previously sued the City for reasons relating to his taking family leave. Petitioner was discharged from employment on June 23, 1998, following his being voluntarily absent from the workplace since May 22, 1998, without directly contacting his Departmental supervisors, notwithstanding various letters and telephone calls by the Department to apprise him of his responsibility to do so. On May 11, 1998, Arora was transferred to the Signal Timing and Research Section, supervised by Brian Gallagher. Arora first reported to work at Signal Timing on May 14, 1998, following an illness. On May 21, 1998, following Gallagher giving Arora an oral warning regarding the quantity and quality of his assignments, Arora left work early. The following day, May 22, 1998, Arora left a voice mail message for Gallagher that he was ill. On the next workday, May 26, 1998, Gallagher received a voice mail message directing him to a letter sent to him by facsimile. The letter, dated May 25, 1998, informed Gallagher that Arora could not return to work until John Federle, the Department Personnel Officer, "makes my working condition humanly bearable," and further informed Gallagher that a "detailed account of the inhumane conditions . . . imposed" had been forwarded to John Federle, the Department's Personnel Officer, and to Gregory Orland, the Deputy City Attorney representing the Department in the first lawsuit. Gallagher called Arora at home, leaving messages on his answering machine on May 27, 1998, stating that Gallagher would mark Arora absent without leave unless Arora called Gallagher. Gallagher further stated that if Arora were ill for more

than three days, upon Arora's return, a doctor's note would be needed by the Department. Despite the City requirement that employees daily report their absences directly to their supervisors, other than receipt of another letter from Arora, dated May 28, 1998, stating that Arora was still awaiting an apology for the hostile work environment, Gallagher never received any further communications from Arora.

On May 25, 1998, Petitioner's attorney, Raj D. Roy, sent letters to Federle and Orland enumerating a list of six demands that Roy "insisted" be addressed "to alleviate some of my [Roy's] concerns . . . . " The letter states: "You are reminded that Mr. Arora will be able to go to work only when the continuous harassment, and demeaning, subhumane [sic] behavior by Mr. Gallagher is stopped, and a written assurance as per this letter is acknowledged to be received by my office. If we do not receive a satisfactory response by May 28, 1998, we will ask the Court to order sanctions against you." Federle spoke with Orland, who advised Federle that Orland would respond to Roy's letter.

On May 28, 1998, Roy again wrote to Federle. The letter states it was the second notice to respond and asks: ". . . [A]re you a central figure in this unjust plot against Mr. Arora?" The letter asks for a written apology for past harassment and written assurance that such incidents will not recur before Arora will return to work.

On May 29, 1998, Orland responded to the May 28, 1998 letter to Federle from Roy. In Orland's letter, he memorialized his May 26, 1998 telephone conversation with Roy addressing each of the six demands of Roy's May 25, 1998 letter to Federle. Most importantly, the letter notified Roy that " . . . [Y]our client will not be supervised

through attorneys. If your client wishes to take legal action, that is his prerogative. Otherwise, as long as your client is an employee of the City of Los Angeles, he is obligated to work through his supervisorial chain of command like any other employee. If he continues to refuse to speak or otherwise directly communicate with his supervisors, his department may take appropriate responsive action." Federle did not consider either letter from Roy concerning Roy's allegations of unfair treatment as justification for Arora's absence from his job. Moreover, at no time did Arora communicate personally with Federle.

On May 29, 1998, Federle sent Arora a letter entitled "Absence Reporting Requirements." The letter advised Arora that due to his failure to personally communicate with his supervisor since May 21, 1998, he was being considered absent without valid leave. Federle reminded Arora of his responsibility to daily report his absence to his supervisor under the Departmental reporting procedures and informed him that if the situation were to continue, Arora's employment would be in jeopardy. A copy of the letter was also sent to Arora's union representative, Mike Koskie.

On June 15, 1998, due to Arora's continued unauthorized absence from the workplace, Federle sent Arora a Notice of Proposed Discharge. The notice notified Arora that a pre-termination hearing was set for June 19, 1998 at 9:30 a.m. with the Department to be represented by Gina Tervalon, Senior Personnel Analyst. The notice was also sent to Mike Koskie, Arora's union representative. The notice stated that Petitioner had until 4:00 p.m. on June 19, 1998 to respond either orally or in writing. Arora did not appear at the hearing, nor did he send a representative or communicate in any way with the Department.

Federle then prepared the Notice of Discharge, Form 77 and recommended Petitioner's discharge to the General Manager, Thomas Swire, who approved the discharge.

The signed Notice of Discharge (commonly referred to as Form 77) was served at Arora's residence on June 23, 1998, by Brian Gallagher, in compliance with the rules of the Civil Service Commission of the City of Los Angeles. When Gallagher received no response to his knock, he taped the Notice of Discharge to Arora's front door.

On June 24, 1998, Arora filed an Appeal from Discharge with the Board of Civil Service Commissioners.

The administrative hearing was set for July 30, 1998, and Petitioner and his counsel were notified of the procedure for requesting subpoenas of witnesses and that hearing continuances would only be granted if agreed upon by the parties and requested not less than five days prior to the hearing.

On July 20, 1998, Roy requested a continuance of the hearing, which was granted, and requested that the Board issue subpoenas duces tecum and appearance subpoenas on Departmental employees John Federle, Brian Gallagher, Gail Rucker, Richard Jaramillo, Tom Swire and Tom Conner, as well as Gregory Orland (the Department's attorney in Arora's first lawsuit).

On July 24, 1998, the Board requested that the City Clerk issue the subpoenas duces tecum and subpoenas. On August 6, 1998, the Office of the City Attorney filed a Motion to Quash the subpoena duces tecum and appearance subpoena to Gregory Orland. On August 10, 1998, in a letter to the Board, the Department of Transportation moved to quash all or portions of the subpoenas duces

tecum to Federle, Gallagher, Rucker and Jaramillo. The Department also moved to quash the appearance subpoenas to Rucker, Jaramillo and Conner.

On August 28, 1998, the Board secretary advised Roy that the hearing was rescheduled for October 1, 1998, at Roy's request and informed Roy the hearing examiner would address and rule on the motions to quash the subpoenas at the beginning of the hearing.

On September 24, 1998, Roy sent a letter to the Board detailing his requirements for the October 1, 1998 hearing which asserts that (1) the hearing must only address preliminary issues; (2) he has a right to bring video recording equipment; (3) he has a right to bring other associates; (4) he requires that only one witness at a time be in the room; and (5) he requires that he be sent the Manual of Policies and Procedures and Administrative Code, Charter and Civil Service Rules immediately. Roy's letter also stated that if he did not hear any objections by September 24, 1998, he would assume the above requirements are agreeable.

At the October 1, 1998 hearing, when the hearing examiner denied Roy's request to videotape and audiotape the proceedings, indicating there would be only one official transcript of the hearing, Roy stated his intention to leave the hearing. The hearing examiner stated: "I'm just going to tell you and tell him [Arora] that I am prepared to proceed today. And if you choose not to participate, the Department's going to put on their case. And it will be unrebutted by you. That is your choice. But you run the risk of losing your case because you haven't put on any evidence." Despite being informed by the hearing examiner that the hearing would go forward even if they chose

to leave, Arora and his attorney Roy walked out of the hearing – without raising any issue other than their objection to Departmental representation by a City Attorney and their objection over not being allowed to videotape the proceedings and thereby create their own record. The hearing continued in their absence, with the Department presenting its case.

On October 28, 1998, the hearing examiner filed her report recommending the sustaining of Arora's termination with the Board of Civil Service Commissioners. The Board sent Petitioner and his counsel a copy of the report and informed each of them that the Board of Civil Service Commissioners would hear the matter at its regular November 13, 1998 meeting. The letter informed them that exceptions to the report should be filed not less than five calendar days prior to consideration by the Board. On November 11, 1998 (two days before the hearing) Arora faxed exceptions to the report to the Board. On November 12, 1998 (one day before the hearing) Arora faxed another letter of exceptions and requested a continuance due to the unavailability of his counsel. Neither Arora nor anyone on his behalf attended the November 13, 1998 meeting of the Board of Civil Service Commissioners. The Board then adopted the hearing examiner's recommendation upholding the Department's termination of Arora's employment for being absent without valid leave. (Said determination was finalized on November 26, 1998).

Arora timely filed a demand for reinstatement in compliance with Los Angeles Charter § 112½ on December 11, 1998. At its January 22, 1999 meeting, the Board of Civil Service Commissioners denied his demand for reinstatement.

Petitioner Arora filed his Petition for Writ of Mandate pursuant to California Code of Civil Procedure § 1094.5 in the California superior court on February 24, 1999, specifically challenging his termination by contending that the hearing examiner's recommendation to sustain his discharge, and, ultimately, its adoption by the Board of Civil Service Commissioners were erroneous. Additionally, Arora challenged Respondents' actions by alleging that his constitutional due process rights were violated. He subsequently amended his petition to add a cause of action for violation of 42 U.S.C. §§ 1983 and 1988.

SUMMARY OF ARGUMENT

There is no compelling interest in this matter warranting review by this court. There is no conflict of decisions raised herein. The decision in this matter turns on its own facts and has no federal impact. Both the California trial court and appellate court correctly exercised their authority. The state courts determined that Petitioner is not entitled to a Writ of Mandamus because his employment was properly terminated for unexcused absence from work and for no other reason.

REASON WHY THE PETITION SHOULD BE DENIED

The State Court's Decision Was Based Solely On Independent State Grounds

The opinion of the state court below (App.1[1]) conclusively shows that Petitioner's termination was due to his being absent from the workplace without authorization and for no other reason, and that the court determined, pursuant to state statutes and case decisions, that at every step of the way Petitioner was afforded the opportunity to present his side.

As this Court explained in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972): "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Roth* at p. 577. In California, the terms and conditions of public employment are generally "fixed by the statute, rules or regulations creating it, . . . " *Williams v. Los Angeles City Dept. of Water and Power,* 130 Cal. App. 3d 677, 680 (1982); see also *Miller v. California,* 18 Cal. 3d 808, 813-14 (1977). A claim of entitlement is created by civil service rules and regulations governing public employment. *Roley v. Pierce County Fire Protection Dist.*, 869 F.2d 491 (9th Cir. 1989).

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[1] The Unpublished California Court of Appeal Opinion, *Arora v. Board of Civil Service Commissioner*, 2002 Cal.App. Unpub. LEXIS 4111 (February 7, 2002) is contained in the Respondent's Appendix.

For more than twenty-five years, the statutes and rules of the Civil Service Commission of the City of Los Angeles have reflected the California Supreme Court's holding in *Skelly v. State Personnel Bd.,* 18 Cal. 3d 395, 556 P. 2d 306 (1976) (which followed this Court's decision in *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974)) in providing the procedural safeguards mandated by the state and federal constitutions. The *Skelly* court held that civil service provisions which provided for a hearing only after an employee was dismissed or otherwise disciplined did not fulfill minimum constitutional demands. In so holding, the court made clear that "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the taking of punitive action." Rather the court determined that due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, required that, at a minimum, the "preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing to the authority initially imposing discipline."

In this matter, the state appellate court determined that, pursuant to state decisional law, these requirements were met since Petitioner knew of the charges against him (by the previous letters from his Department) and he had an opportunity to respond (he could have contacted the Department upon receipt of the notice and rescheduled the hearing). See *Skelly, supra*, 18 Cal. 3d 395 at p. 215. Further, the state court found that, pursuant to state decisional law, Petitioner, who had the opportunity to raise the issue of the untimeliness of the pre-termination notice

at his administrative hearing, waived his due process right to an opportunity to be heard and present his side when he walked out of the administrative hearing without raising these issues. See *Mims v. Los Angeles Community Coll. Dist.*, 117 Cal. App. 3d 352 (1981).

The state court, in affirming the decision of the trial court in denying Petitioner's petition for writ of mandamus, placed its judgment entirely on adequate state grounds which were broad enough to sustain it.

CONCLUSION

As stated above, there is no compelling reason for this Court to grant a writ of certiorari in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROCKARD J. DELGADILLO,
City Attorney

PATRICIA V. TUBERT,
Chief Assistant City Attorney
Counsel of Record

ZNA PORTLOCK HOUSTON,
Managing Assistant City Attorney

Attorneys for Respondents, Board of Civil Service Commissioners; City of Los Angeles

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1. Unpublished Opinion of the California Court of Appeal, Second Appellate District, Third Division, February 7, 2002 ..... App. 1

2002 Cal. App. Unpub. LEXIS 4111
printed in FULL format.

NARESH ARORA, Plaintiff and Appellant, v. BOARD OF CIVIL SERVICE COMMISSIONERS; CITY OF LOS ANGELES, Defendants and Respondents.

B141389
COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE
2002 Cal. App. Unpub. LEXIS 4111

February 7, 2002 Filed

NOTICE:

NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

SUBSEQUENT HISTORY: As Modified February 28, 2002. Petition for Rehearing Denied February 28, 2002. No Change in Judgment

PRIOR HISTORY: Appeal from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BS 055816. David P. Yaffe, Judge.

DISPOSITION: Affirmed.

COUNSEL: Naresh Arora in Propia Persona.

James K. Hahn, City Attorney, Leslie E. Brown, Assistant City Attorney, and Zna P. Houston, Deputy City Attorney, for Defendants and Respondents.

JUDGES: CROSKEY, J. We concur: KLEIN, P.J., KITCHING, J.

OPINION BY: CROSKEY

OPINION:

Naresh Arora (employee) was discharged from his job with the City of Los Angeles (employer) for being absent without valid leave. He pursued his administrative remedies, but the Board of Civil Service Commissioners (Board) ultimately found in employer's favor. His petition for a writ of administrative mandamus was denied, and h cause of action for violation of civil rights was also dismissed. He now seeks review of the trial court's decision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND [1]

From 1988 to 1998, employee worked for employer's Department of Transportation (the Department) as an engineering assistant and then as an engineering associate. His employment led him to sue his employer for reasons related to taking family leave (the first lawsuit). While that suit was proceeding, he was transferred to a different section, where his supervisor was Brian Gallagher. He reported to Gallagher on May 14, 1998, following an illness. A week later, after Gallagher orally warned him about the quality and quantity of his work, he left early, on May 21. The next day, he called in sick. On the next workday, May 26, he called and told Gallagher he was

[1] We recite facts taken from the Respondent's Appendix and the Appellant's Appendix in Lieu of Clerk's Transcripts.

sending Gallagher a facsimile message. That facsimile message, a letter dated May 25, stated that he would not return to work until John Federle, the Department's Personnel Officer, made his working conditions "humanly bearable." Employee sent a copy of this demand to Federle as well as to Gregory Orland, a Deputy City Attorney representing employer in the first lawsuit.

According to employer's personnel manual, employee was required to take certain steps in order to be absent with leave. For example, if he was going to be gone for more than three days because of illness, he needed a doctor's note upon his return, and he also needed to check in with his employer on a daily basis. Gallagher contacted employee and reminded him of these requirements. Employee did not follow these requirements. Instead, his attorney in the first lawsuit sent a letter to Federle and Orland demanding certain changes to employee's working conditions, and accusing Gallagher of certain demeaning and "subhuman" behavior. Employer, via Gallagher, reminded employee that he would be considered absent without valid leave if he did not make a daily report to his employer, and that he could lose his job if he did not comply.

Things continued in this vein until employee had been absent without approved leave for almost a month. By letter dated June 15, 1998 and entitled "Proposed Discharge – Absent without Valid Leave," Federle notified employee that employer's records showed employee had been absent without valid leave since May 22, 1998, and that this was sufficient cause for discharge. Employer's attempts to contact employee were described, as were the previous warnings given to employee. The letter told employee that failure to act in one of two ways by June 19,

1998 "will result in final consideration of your proposed discharge"; those two actions were to either report to work (and be subject to later discipline for being absent without valid leave) or submit a written resignation (using the enclosed resignation form). The June 15 letter also invited employee to respond to the charge of being absent without valid leave either in writing or orally. It informed him that there would be a hearing on June 19, 1998, a *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 hearing, at a specified location and time. It further warned him that if he had not taken one of the two described actions or responded by 4 p.m. on June 19, 1998, employer would proceed with the proposed discharge based on the charge of being absent without valid leave. Employee, who asserted that he did not receive the June 15 letter until June 20, 1998, did not attend the June 19 hearing or otherwise respond in any way. At that point, Gallagher went to employee's home and posted a "Notice of Discharge" on the door after employee failed to answer his knock. The next day, employee filed an "Appeal from Discharge" with the Board.

The Board set an administrative hearing and notified the parties of applicable procedures. At employee's attorney's request, the hearing was continued, and employee asked the Board to issue subpoenas duces tecum and appearance subpoenas to six Department employees, and to Orland. These subpoenas asked for some materials that appeared to be irrelevant and/or privileged attorney/client communications. Employer moved to quash all or some portion of the subpoenas duces tecum for four of the employees, and, as to two employees, simply responded that there were no responsive documents.

The hearing was set for October 1, 1998, and the motion to quash was scheduled to be heard at the beginning of the hearing. Employee's attorney sent the hearing officer, Jill Klein, a letter setting out his requirements for the hearing, including that (1) the hearing only address preliminary issues, (2) he be allowed to videotape the proceedings, (3) he be allowed to bring associates, (4) only one witness at a time be allowed to attend the hearing, and (5) he immediately be given a copy of the polices and procedures manual and charter and civil service rules.

At the hearing, Klein denied employee's request to videotape the proceedings, indicating that there would be only one official transcript of the hearing. In addition, she also said that the hearing would proceed that day, and warned employee that if he failed to put on any evidence, he could lose his case. Employee and his attorney simply objected to the Department being represented by a city attorney, and that they could not videotape the proceedings. They left, and did not put on any evidence. However, the Department remained and put on its case.

On October 28, 1998, the hearing officer filed a report with the Board recommending that employee's termination be upheld. Both parties were given a copy of the report and told that the Board would consider the matter on November 13, and that exceptions to the report should be filed no later than five days before the Board's hearing. One day before the hearing, employee faxed the Board a letter of exceptions and requested a continuance due to his attorney's unavailability. Neither employee nor an attorney on his behalf attended the November 13 hearing, and the Board adopted the hearing officer's recommendation upholding employer's termination of employee's employment.

Employee, following the administrative procedure, made a demand for reinstatement, which was denied. He then filed a petition for a writ of administrative mandamus. He contended that his procedural due process rights had been violated, and also that the hearing officer's recommendations were not supported by the evidence. In connection with the petition, he sought further discovery, which the trial court denied, restricting him to the administrative record as a basis for the hearing on his petition.

Employee then amended his petition to add a cause of action for violation of 42 U.S.C. sections 1983 and 1988, and named some additional defendants. The trial court denied the amended petition, and dismissed the new cause of action. Employee's motion for a new trial was also denied.

CONTENTIONS ON APPEAL

Employee contends that the record shows that he was denied due process before he was terminated from employment, and that he was terminated in retaliation for exercising his constitutional rights. He further contends that the Board acted in excess of its jurisdiction and in violation of the city's charter, that it did not proceed in the manner required by law, its decision was not supported by the findings, and that the evidence does not support its findings.

Employee also contends that he was denied his constitutional rights to compel attendance of witnesses, to cross-examine them at the administrative proceeding, to be heard, and to a continuance so that he could be represented by counsel. In addition, he contends the trial court lacked subject matter and personal jurisdiction over his 42

U.S.C sections 1983 and 1988 causes of action, and that it wrongfully dismissed such causes of action. Finally, he contends the trial court erred by denying his motion for a new trial, and by failing to provide him with a statement of decision.

DISCUSSION

1. Standard of Review

In ruling on a petition for a writ of administrative mandamus, the trial court reviews the administrative record to determine whether the agency's decision is supported by substantial evidence in light of the whole record. (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610; *California State Auto. Assn. Inter-Ins. Bureau v. Garamendi* (1992) 6 Cal.App.4th 1409, 1418.) The court must consider all relevant evidence in the record, but "'it is for the agency to weigh the preponderance of conflicting evidence. [Citation.] Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.'" (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th at p. 610, italics omitted, quoting *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal. App. 3d 175, 186, 131 Cal. Rptr. 462.) "The standard of review for [the appellate] court is identical: We, too, determine whether substantial evidence supports the administrative decision. [Citation.]" (*Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 916 and cases cited there.) If no challenge to the factual findings is made, an appellate court need only determine whether the administrative agency's ruling was so arbitrary and capricious as to amount to an abuse of discretion. (Ibid.)

Here, the Board found employee was fired for being absent without a valid leave. In other words, employee did not met his burden of proving he was entitled to reinstatement. The question before the trial court, and before us, is whether there is substantial evidence to support the administrative determination. In addition, we independently review the legal question of whether employee's procedural rights were violated during the hearing process, although to the extent such issues depend on conflicting evidence as to the underlying facts, we defer to the agency's and/or lower court's factual determinations, and assume the facts were such as support the lower tribunals' determinations. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 73.)

2. Employee Was Not Denied Due Process Before Being Terminated

Due process is simply notice and an opportunity to be heard. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286.) Employee was given due process. He was given notice of the various hearings, and an opportunity to participate. He was told the reason for his termination. This reason, absence without a valid leave, was a reason for discharge listed in Department's Manual of Policies and Procedures. The evidence showed he was warned that termination could be the penalty if he failed to return before a certain date, and the applicable section of the Manual, dated 6/96, made it clear not only that the penalty of discharge was a possibility, but that an employee absent for more than seven days could be considered to have abandoned his or her job.

Employee's failure to participate in the hearing, given that he received notice and an opportunity to be heard, does not constitute a denial of due process. (*Britz, Inc. v. Dow Chemical Company* (1999) 73 Cal.App.4th 177, 185.) When employee left the hearing before the Board because he was unhappy with the procedure being used, he was not denied due process. And, because he left the hearing and did not participate, he failed to raise the issue of whether the notice of his hearing pursuant to *Skelly v. State Personnel Bd., supra,* 15 Cal.3d 194 (the June 1998 letter) was adequate or not, and thus waived that issue.

Even if he had raised the issue before the Board, the evidence before the hearing officer was such that the Board could have found that the *Skelly* notice was adequate. Employee admitted he received the June 15, 1998 letter, albeit not until June 20, 1998. Upon its receipt, employee could have contacted employer and informed employer he had received the notice late, and asked for a *Skelly* hearing on a date after June 19, because of late receipt of the letter. He did not do so, either before or after he was officially terminated on June 23, 1998. Under *Skelly,* all that is required in the way of pre removal safeguards is notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (*Skelly, supra,* 15 Cal.3d at p. 215.) These requirements were met in this case. In addition to the June 15, 1998 letter, employee also had been given a May 29, 1998 letter warning him that if he failed to report his absence from work to his supervisor on a daily basis, he could be placed on an Absent without Valid Leave status, and his employment status could be in jeopardy. Thus, his situation is

factually distinguishable from *Shannon v. City of Los Angeles* (1928) 205 Cal. 366, 270 P. 682, the case on which employee relies. In that case, the employee never received written notice of the charge against him, and the evidence showed the notice was sent to an address at which he had never resided. Here, it is readily apparent that employee received notice, and that the requirement of due process was met: employee knew the charge against him and had an opportunity to respond to the charge.

More on point are the cases of (1) *Bussey v. Los Angeles Civil Service Commission* (1977) 72 Cal.App.3d 912, 922, in which, although the employee failed to attend the *Skelly* hearing (having received but overlooked the notice of such hearing), the reviewing court concluded that *Skelly's* requirements were satisfied by the employer's earlier warnings and identification of the problem behavior and the result to which such behavior could lead, if not corrected, and (2) *Mims v. Los Angeles Community College Dist.* (1981) 117 Cal.App.3d 352, 357-358, in which the employee could have, but did not, raise the issue of the untimeliness of the pre-termination notice before the personnel commission that reviewed the decision to terminate.

3. The Evidence Showed that Employee Was Terminated for Being Absent Without Valid Leave

The evidence presented to the hearing officer showed that employee was absent without valid leave. The Board accepted this evidence, too. As noted above, " '[i]t is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the

agency.'" (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th at p. 610, quoting *McMillan v. American Gen. Fin. Corp., supra,* 60 Cal.App.3d 175, 186.) Here, a reasonable person *could* reach the conclusion reached by the Board; accordingly, we must affirm.

4. The Board Did Not Act in Excess of its Jurisdiction or in Violation of the City's Charter and Its Decision Was Supported by the Evidence

Employee apparently thinks the Board acted in excess of its jurisdiction because he was never properly served with notice of discharge, and because "the administrative record is completely silent if the accusatory pleading was ever filed with the Board," both procedural requirements set out in the City Charter. As employer points out, the evidence showed employee *was* served with notice, and that the Board received the accusatory pleading, as shown by its minutes of July 31, 1998. Its decision that employee was terminated for being absent without valid leave was made in compliance with the applicable procedure, and was fully supported by the evidence.

5. Employee Was Not Denied Any Constitutional Rights

Employee also contends that he was denied his (1) constitutional right to compel attendance of witnesses and to cross-examine them at the administrative proceeding, (2) right to be heard, and (3) right to a continuance so that he could be represented by counsel. These contentions are without merit. Employee had the right to call witnesses, and, in fact, Board issued subpoenas to compel their attendance. He was not precluded from cross-examining

them as to relevant matters. Furthermore, employee points to no authority that he had an absolute right to a continuance when he requested a continuance at the last minute with no good reason for such delay. On this record, we find no procedural actions that deprived him of any constitutional rights.

6. The Trial Court Had Jurisdiction Over the 42 U.S.C. Causes of Action, and Properly Dismissed Such Causes of Action

Employee contends that the trial court lacked personal and subject matter jurisdiction over his causes of action for violation of 42 U.S.C. sections 1983 and 1988, as set out in his amended petition. This contention is patently without merit. First, by filing the amended petition seeking relief for such violation, he consented to personal jurisdiction. (*In re Marriage of McDonough* (1986) 183 Cal.App.3d 45, 52, 227 Cal.Rptr. 872.) Furthermore, state superior courts have concurrent subject matter jurisdiction over such claims. (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1170.)

Because the evidence in the administrative record showed that employee was terminated for being absent without valid leave, it follows that he was not terminated for exercising protected constitutional rights. If he was not terminated for exercising protected constitutional rights, his section 1983 and 1988 causes of action were not viable, and the trial court properly dismissed them. (See *Mata v. Superior Court* (1993) 20 Cal.App.4th 141, 149-150 [a tort action pursuant to 42 U.S.C. § 1983 based on allegedly wrongful termination is not authorized unless an employee prevails in his or her petition for administrative mandamus on such issue].)

7. The Trial Court Did Not Err as to the Statement of Decision

Employee contends that the trial court was required to provide a statement of decision with findings for all controverted facts. Here, the trial court stated that its tentative decision would be deemed its statement of decision, a technique allowed by California Rules of Court, rule 232(a). Contrary to employee's assertions, the statement of decision specifically stated that the court had independently reviewed the administrative record, and concluded that the weight of the evidence supported the Board's decision, thus showing the trial court applied the correct standard of review. In addition, by so stating, the trial court's statement of decision incorporated by reference the findings of ultimate fact made by the Board, making it sufficiently detailed. (*Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 597.)

8. The Trial Court Did Not Err by Denying the Motion for a New Trial

Employee contends the trial court erred by not granting his motion for a new trial. There are certain statutory bases for granting such a motion. (Code Civ. Proc., § 657.) Although employee raised many of them in his motion, upon review, we find no basis upon which the trial court should have granted the motion. DISPOSITION

The judgment is affirmed. The defendants are awarded their costs on appeal.

CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.

(3)

Supreme Court, U.S.
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No. 02-148

In The

Supreme Court of the United States

NARESH ARORA,

Petitioner,

v.

BOARD OF CIVIL SERVICE COMMISSIONERS;
CITY OF LOS ANGELES,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Second District, Third Division

REPLY BRIEF

NARESH C. ARORA
Chase Street, # 139
Canoga Park, CA 91304-2636
(818) 341-7487
Pro se

6 pp

REPLY TO BRIEF IN OPPOSITION

The Petition for writ of Certiorari ("Petition" or "Pet.") included four contentions explaining why the Petition should be granted. Out of four contentions, the respondents chose to rebut only one, stated on page 15 of the Petition. *See* Brief in Opposition of Respondents Board of Civil Service Commissioners, City of Los Angeles ("Opp'n") on pages 8-10.

For the remaining three contentions, the respondents deemed consented that the arguments are meritorious and therefore this court should consider granting the Petition. By virtue of not rebutting the contentions, the respondents impliedly conceded, in part, that no one ever properly served the accusatory pleading, and subsequently filed with the Board pursuant to (1) Personnel Department Policy 33.1F3 stated on Pet. at App. 41 and (2) Charter § 112(a) stated on Pet. at App. 41. This had resulted in invalid termination of petitioner. This is also proof that the Administrative Law Judge acted without jurisdiction, or in other words, acted under the doctrine of "hypothetical jurisdiction." As a result of which all the decisions, orders, and judgments at all levels of proceeding are null and void.

The respondents also impliedly conceded that Zna Houston ("Houston"), respondents' counsel of record in the court below, did not have the conformed copy of the accusatory pleading in her possession alleging full statement of the statutory disciplinary code violations, corresponding penalties and the facts leading up to petitioner's discharge. And yet Houston successfully misled the court below. If Houston were in possession of the conformed copy of the accusatory pleading, she would have made this a part of the Appendix of the Brief in Opposition.

For only one contention, stated at Pet. 15, in which the petitioner stated that the City did not afford him a *Skelly* hearing before his termination from employment, the respondents' counsels are now making a great stride to mislead this Court. *See* Opp'n at 8-10. Following is the detailed account of respondents' misleading and deceptive arguments:

1. *Opp'n at 8*: "The Opinion of the state court below . . . shows that Petitioner's termination was due to his being absent from the workplace . . . and that the court determined, pursuant to *state statutes and case decisions*, that at every step of the way Petitioner was afforded the opportunity to present his side." (Emphasis added.)

Without arguing the issues at this moment whether the California Courts complied with the state statutes and state case laws, it is imperative that the appellate court's decision should not conflict with this Court's relevant decisions and the laws of the United States. Failure to comply with the U.S. Constitution, federal statutes and laws, in rendering decisions by the state judges, leads to null and void results. *See* U.S. Constitution, article VI, § 2: the supreme Law of the Land. The state courts are not supposed to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States – "the supreme law of the land." *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 335 (1816). State courts are bound to give effect to federal law when it is applicable, and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and congressional enactments and treaties but also the interpretations of their meanings by the U.S. Supreme Court. *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958).

A detailed account had been presented in the Petition by citing innumerable violations of the U.S. Constitution, federal laws, statutes, and this Court's relevant decisions at all levels of the proceeding starting from the Board to the highest California State Court, where review could be had. Thus the respondents' argument carries no weight since the state courts below were mandated to follow "the supreme law of the land."

2. *Opp'n at 9*: "In this matter, the state appellate court determined that, pursuant to state decisional law, these [due process] requirements were met since Petitioner knew of the charges against him (by the previous letters [sic] [of May 29, 1998] from his Department). . . ."

Looking at the first part of the sentence, it appears that respondents want this Court to consider May 29, 1998 letter as a *Skelly* hearing notice. Respondents have included pertinent parts of the contents of the May 29, 1998 letter in the Brief in Opposition. *See* Opp'n at 3. Nowhere in the letter did John Federle ("Federle") state that he was proposing petitioner's discharge and providing any reason therefor. Federle did not include any copy of the charges and materials as no charges were leveled against petitioner in the letter. As such there was no opportunity offered, either orally or in writing, to refute or challenge. So, construing the May 29, 1998 letter as another *Skelly* hearing notice was a fatal decision made by the Court of Appeal. The May 29, 1998 letter did not comply with the Due Process Clause as outlined in *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972). It is well established that there was only one *Skelly* notice mailed out, for a *Skelly* hearing on June 19, 1998, which was not received by petitioner in time to attend the *Skelly* hearing.

3. *Opp'n at 9*: "In this matter, the state appellate court determined that, pursuant to state decisional law, these requirements were met since Petitioner . . . had an opportunity to respond (he could have contacted the Department upon receipt of the notice [on June 20, 1998] and rescheduled the hearing)."

For the remaining portion of the sentence, respondents in a way reiterated and rephrased erroneous factual findings made by the Court of Appeal by stating that petitioner did not notify the City of late receipt of the *Skelly* hearing notice. *See* also Pet. at App. 37.

Contrary to what the respondents are trying to prove to this court, Petitioner's former counsel, Raj D. Roy (Roy), faxed a letter to the City attorney informing the late receipt of the *Skelly* hearing notice. *See* Pet. at 5. The message was transmitted at about 5:00 p.m. on June 23, 1998 and subsequently the receipt of the message by the City was confirmed over the phone. The same message was again transmitted at 9:01 p.m. on June 23, 1998 through fax with proper proof of service duly signed by a third party. These facts are all part of the records on pages

358-363, filed with the court below. Petitioner made this fact known to the court below by asserting in the "Statement of Facts" on pages 8-9 of the opening brief. The purpose to notify the City on June 23, 1998 was simply to request a *Skelly* hearing, because of defective and late receipt of the *Skelly* notice. The City failed to correct its own mistakes and did not care to respond. *See* Pet. at 5.

By raising the aforementioned argument, the respondents' counsels are pretending complete ignorance of the facts enumerated above, although the facts are and were known to them. This is once again a shear attempt to mislead this Court.

4. *Opp'n at 9-10*: "Further, the state court found that, pursuant to state decisional law, Petitioner, who had the opportunity to raise the issue of the untimeliness of the pre-termination notice at his administrative hearing, waived his due process right to an opportunity to be heard and present his side when he walked out of the administrative hearing without raising these issues. *See Mims v. Los Angeles Community Coll. Dist.*, 117 Cal.App.3d 352 (1981)."

In the opinion filed on February 28, 2002, the court below stated that the employee in *Mims* could have, but did not, raise the issue of the untimeliness of the pre-termination notice before the personnel commission that reviewed the decision to terminate. *See* Pet. at App. 38. Petitioner has reviewed the *Mims* case, and could not find this argument anywhere. Therefore, the court below erred citing the *Mims* case in reference to the point stated above. This also establishes that the respondents' argument is erroneous, and perhaps it is this reason why the respondents did not direct this Court's attention to the particular page of the *Mims* case.

Rules of the U.S. Supreme Court, Rule 15 (2) states in pertinent part that the brief in opposition should address the perceived misstatement of fact or law in the petition that bears on the issues properly before the Court if certiorari were to be granted. Nowhere in the rule does it state that respondents' counsel should deliberately and

intentionally mislead the highest Court in the nation. The respondents' counsel had an affirmative duty to conduct business uprightly and according to law. *See* Rules of the U.S. Supreme Court, Rule 5(4).

The complete argument advanced by the respondents rests on the opinion rendered by the California Court of Appeal. The opinion is, in fact, erroneous in substantial part. Furthermore, this part of the opinion referenced by the respondents was filed concurrently at the time of denying petitioner's petition for rehearing in the court below. Petitioner's due process rights were denied as he could not challenge or rebut the Court of Appeal's erroneous factual findings and conclusions of law. It is the duty of an attorney, a counselor of this Court, to strictly comply with the Rules of the U.S. Supreme Court, Rule 15(2), instead of rehashing the opinion of the court below in the Brief in Opposition. This Court should simply disregard the respondents' Brief in Opposition.

The Petition offers a novel issue, wherein the appellate court files an erroneous opinion, concurrently with an order of denying the petition for rehearing. This situation is likely to recur again in the future, and it is one of the reasons why petitioner wants the guidance of this Court to address this type of situation to prevent deprivation of due process rights of the party who might face the same situation as petitioner is facing now.

CONCLUSION

Predicated upon the above, petitioner respectfully requests this Court to disregard the Brief in Opposition and grant a writ of certiorari in this case.

Respectfully submitted,

NARESH C. ARORA
Chase Street, # 139
Canoga Park, CA 91304-2636
(818) 341-7487
Petitioner in Pro Se